

**FEDERAL MARITIME COMMISSION**

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**DOCKET NO. 14-06**

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**SANTA FE DISCOUNT CRUISE PARKING, INC. d/b/a EZ  
CRUISE PARKING; LIGHTHOUSE PARKING, INC.; and  
SYLVIA ROBLEDO d/b/a 81<sup>ST</sup> DOLPHIN PARKING**

**v.**

**THE BOARD OF TRUSTEES OF THE GALVESTON  
WHARVES and THE GALVESTON PORT FACILITIES  
CORPORATION**

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**BRIEF OF RESPONDENTS THE GALVESTON WHARVES AND THE GALVESTON  
PORT FACILITIES CORPORATION**

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The Board of Trustees of the Galveston Wharves (“Wharves”) and the Galveston Port Facilities Corporation (“GPFC”) (collectively “Respondents”). Pursuant to the Scheduling Order dated January 14, 2015 and 46 C.F.R. 502.221, hereby submit this Respondents’ Brief. In addition to Respondents’ Brief, pursuant to the above-cited Procedural Order, Respondents’ simultaneously file Proposed Findings of Fact and an Appendix containing the evidence upon which Respondents’ Proposed Findings of Fact are based.

## **I. INTRODUCTION**

### **A. The Galveston Wharves**

The Wharves is also known as, and does business as, the Port of Galveston. Legally, the Wharves is a separate utility and body politic created by the City of Galveston pursuant to Article XII of the Galveston City Charter and Chapter 54 of the Texas Transportation Code. (RPFF 1) GALVESTON, TEX., CHARTER, art. XII, §§ 1-2 (Comp. App. Tab 14 at p.278). The Wharves is managed by a seven-member Board of Trustees, which is appointed by the Galveston City Council. *Id.* In contrast to other Ports, such as the nearby Port of Houston Authority, the Wharves does not levy ad valorem (property) taxes to help subsidize its operations and financial requirements. (RPFF 3) Affidavit of Michael Mierzwa at ¶ 5 (Resp. App. Tab 75 p. 2070-2071). Rather, it must rely on revenues, grants, bank loans and bond debt to fund its operations and infrastructure improvements. (RPFF 4) *Id.* The Wharves does not generate enough funds from these sources to cover all needed repairs and improvements; thus, it must prioritize and do what it can with the funds it has. (RPFF 5)

### **B. Galveston Port Facilities Corporation**

GPFC is a legal hybrid - a "local government corporation" authorized by Texas state law pursuant to Subchapter D, Chapter 431 of the Texas Transportation Code. (RPFF 6) TEX.

TRANSP. CODE ANN. § 431.108 (Resp. App. Tab 73 at p.1950). Such corporations are authorized to be created to aid one or more units of local government to accomplish any governmental purpose of those local governments. TEX. TRANSP. CODE ANN. § 431.101(a). In this case, the Wharves is entitled to any income generated by GPFC that is not needed to pay GPFC's expenses or obligations. (RPFF 8) *See id.* at § 431.107; GPFC Articles of Incorporation at art. XII. (Comp. App. Tab 15 p. 287; Resp. App. Tab 72 p. 1949). GPFC was created to facilitate the financing, construction and operation of the Galveston Island Cruise Terminals. (RPFF 9) Affidavit of Michael Mierzwa at ¶ 9 (Resp. App. Tab 75 p. 2071). GPFC's financial information is reported on a consolidated basis in the Wharves' financial statements, because their activities are so inter-related that doing otherwise would be materially misleading. (RPFF 10) Affidavit of Mark Murchison at ¶ 9 (Resp. App. Tab 77); Affidavit of Jeffery Compton (Resp. App. Tab 78); Rebuttal Expert Report of Jeffery Compton, p. 4, ¶ 19 (Resp. App. Tab 7 at p.404); Wharves—2009 Comprehensive Annual Financial Report at BOT\_014303 (Resp. App. Tab 12 p. 1005); Wharves—2010 Comprehensive Annual Financial Report at BOT\_013986 (Resp. App. Tab 13 p. 1072); Wharves—2011 Comprehensive Annual Financial Report at BOT\_013901 (Resp. App. Tab 14 p.1093); Wharves—2012 Comprehensive Annual Financial Report at BOT\_014464 (Resp. App. Tab 15 p.1166); Wharves—2013 Comprehensive Annual Financial Report at BOT\_014552 (Resp. App. Tab 16 p.1254); Wharves—2014 Comprehensive Annual Financial Report at p. 3 (Resp. App. Tab 77 p. 2083). GPFC has not issued a Tariff (RPFF 11) Affidavit of Michael Mierzwa at ¶ 10 (Resp. App. Tab 75 at p. 2071) Affidavit of Mark Murchison at ¶ 4 (Resp. App. Tab 77 p. 2081). It has never issued a Tariff. *Id.* It has never billed or collected Access Fees to Complainants or anyone else. (RPFF 12) Affidavit of Michael Mierzwa at ¶ 11 (Resp. App. Tab 75 at p.2071); Affidavit of Mark Murchison at ¶ 4 (Resp. App. Tab 77 at

p.2081). *See generally*, Commodore Access Fees (BOT 015921 – BOT 15950) (Comp. App. Tab 46 at p.771), County Inn Access Fees (BOT 015951 – BOT 15982) (Comp. App. Tab 47 at p.801), Marriott Access Fees (BOT 015983 – BOT 16004) (Comp. App. Tab 48 at p.833), Fertitta Access Fees (BOT 016196 – BOT 16262) (Comp. App. Tab 49 at p.855), Galveston Beach Hotel Access Fees (BOT 01626 3 – BOT 16273) (Comp. App. Tab 50 at p.922), Hampton Inn Access Fees (BOT 016274 – BOT 16321) (Comp. App. Tab 51 at p.933), Holiday Inn Access Fees (BOT 016322 – BOT 16379) (Comp. App. Tab 52 at p.982), Holiday Inn (Sunspreet Resort) Access Fees (BOT 016380 – BOT 16441) (Comp. App. Tab 53 at p.1039), Galvez Hotel Access Fees (BOT 016442 – BOT 16557) (Comp. App. Tab 54 at p.1101), Inn at the Waterpark Access Fees (BOT 016558 – BOT 16568) (Comp. App. Tab 55 at p.1217), Island Breeze Shuttle Access Fees (BOT 016569 – BOT 16579) (Comp. App. Tab 56 at p.1228), LaQuinta Hotel Access Fees (BOT 016580 – BOT 16686) (Comp. App. Tab 57 at p.1239), Moody Gardens Access Fees (BOT 016798 – BOT 16916) (Comp. App. Tab 58 at p.1346), San Luis Hotel Access Fees (BOT 016922 – BOT 17038) (Comp. App. Tab 59 at p.1465), Tremont Hotel Access Fees (BOT 017039 – BOT 17144) (Comp. App. Tab 60 at p.1582), The Woodlands Access Fees (BOT 017180 – BOT 17185) (Comp. App. Tab 61 at p.1688), AAA Corporation Access Fees (BOT 017186 – BOT 17190) (Comp. App. Tab 62 at p.1694), Abiding Limo Access Fees (BOT 017191 – BOT 17193) (Comp. App. Tab 63 at p.1699), Action Limo Access Fees (BOT 017194 – BOT 17201) (Comp. App. Tab 64 at p.1702), AFC Corporate Transportation Access Fees (BOT 017202 – BOT 17205) (Comp. App. Tab 65 at p.1710), AIM Limo Access Fees (BOT 017206 – BOT 17210) (Comp. App. Tab 66 at p.1714), Airport Transportation Access Fees (BOT 017211 – BOT 17212) (Comp. App. Tab 67 at p.1719), American Standard Limo Access Fees (BOT 017213 – BOT 17214)

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(Comp. App. Tab 112 at p.1928), Shif Limo Access Fees (BOT 017423 – BOT 17424) (Comp. App. Tab 113 at p.1931), Sierra Trailways Access Fees (BOT 017425 – BOT 17428) (Comp. App. Tab 114 at p.1933), SMZ Transportation Access Fees (BOT 017429 – BOT 17433) (Comp. App. Tab 115 at p.1937), Space Town Transportation Access Fees (BOT 017434 – BOT 17437) (Comp. App. Tab 116 at p.1942), Superior Limo Access Fees (BOT 017438 – BOT 17439) (Comp. App. Tab 117 at p.1946), Totally Texas Limo Access Fees (BOT 017440 – BOT 17445) (Comp. App. Tab 118 at p.1948), Town Car Limo Access Fees (BOT 017446 – BOT 17447) (Comp. App. Tab 119 at p.1954), Transgate Limo Access Fees (BOT 017448 – BOT 17452) (Comp. App. Tab 120 at p.1956), Transportation Unlimited Access Fees (BOT 017453 – BOT 17455) (Comp. App. Tab 121 at p.1961), Western Motorcoach, Inc. Access Fees (BOT 017456 – BOT 17457) (Comp. App. Tab 122 at p.1964), Wynn Coaches Access Fees (BOT 017458 – BOT 17461) (Comp. App. Tab 123 at p.1966), Z Limo Services Access Fees (BOT 017462 – BOT 17470) (Comp. App. Tab 124 at p.1970).

GPFC has a board of nine directors. (RPPF 13) GPFC Articles of Incorporation at Art. VI (Comp. App. Tab 15 at p.287). Seven of the nine directors are the seven members of the Board of Trustees of the Galveston Wharves. (RPPF 13) *Id.* Additionally, two non-Trustee directors are appointed by the City Council of the City of Galveston (the same body which appoints the Wharves Board of Trustees). (RPPF 13) *Id.* GPFC has no employees. (RPFF 14) Affidavit of Mark Murchison at ¶ 4 (Resp. App. Tab 77 at p.2081); Affidavit of Michael Mierzwa at ¶ 8 (Resp. App. Tab 75 at p. 2071).

In order to utilize the benefits GPFC offered as a local government corporation, an organizational structure was established as follows:

1. The Wharves leased the Cruise Terminals to GPFC. (RPFF 15) Lease and Development Agreement—Cruise Terminal No. I, BOT\_018034-018054 (Resp. App. Tab 18 at p.1404); Lease and Development Agreement—Cruise Terminal No. II, BOT\_018055-018072 (Resp. App. Tab 19 at p.1425).
2. GPFC then entered a Management Agreement with the Wharves, under which the Wharves manages the Cruise Terminals for GPFC. (RPFF 16) *Id.*
3. GPFC enters agreements with Cruise Lines, such as Royal Caribbean Cruise Lines and Carnival Cruise Lines. (RPFF 17) *Id.* Wharves employees perform GPFC's obligations thereunder, pursuant to the Management Agreement. (RPFF 18). Lease and Development Agreement—Cruise Terminal No. I, BOT\_018034-018054 (Resp. App. Tab 18 at p.1404); Lease and Development Agreement—Cruise Terminal No. II, BOT\_018055-018072 (Resp. App. Tab 19 at p.1425).
4. Both GPFC and the Wharves collect various sources of revenues, and are responsible for paying various categories of expenses, relating to the Cruise Terminals. (RPFF 19) Lease and Development Agreement—Cruise Terminal No. I, BOT\_018034-018054 (Resp. App. Tab 18 at p.1404); Lease and Development Agreement—Cruise Terminal No. II, BOT\_018055-018072 (Resp. App. Tab 19 at p.1425); Wharves—2006 Comprehensive Annual Financial Report BOT\_017544-17618 (Resp. App. Tab 9 at p. 794); Wharves—2007 Comprehensive Annual Financial Report (Resp. App. Tab 10 p. 861); Wharves—2008 Comprehensive Annual Financial Report (Resp. App. Tab 11 p.1054); Wharves—2009 Comprehensive Annual Financial Report (Resp. App. Tab 12 p. 972); Wharves—2010 Comprehensive Annual Financial Report (Resp. App. Tab 13 p. 1054); Wharves—2011 Comprehensive Annual Financial Report (Resp. App. Tab 14 p. 1139); Wharves—2012 Comprehensive Annual Financial Report (Resp. App. Tab 15

p. 1227); Wharves—2013 Comprehensive Annual Financial Report (Resp. App. Tab 16 p. 1315); Wharves—2014 Comprehensive Annual Financial Report (Resp. App. Tab 77 p. 2089).

5. As noted above, any net income attributable to GFPC is ultimately transferred to the Wharves (RPFF 20), and Wharves and GPFC report their finances on a consolidated basis. (RPFF 10). Lease and Development Agreement—Cruise Terminal No. I, at BOT\_018035-018036 (Resp. App. Tab 18 at p.1404); Lease and Development Agreement—Cruise Terminal No. II, BOT\_018056-018057 (Resp. App. Tab 19 at p.1425); Affidavit of Mark Murchison at ¶ 9 (Resp. App. Tab 77 p. 2083); Affidavit of Jeffery Compton (Resp. App. Tab 103); Rebuttal Expert Report of Jeffery Compton, p. 4, ¶ 19 (Resp. App. Tab 7 at p.404); Wharves—2009 Comprehensive Annual Financial Report at BOT\_014303 (Resp. App. Tab 121005); Wharves—2010 Comprehensive Annual Financial Report at BOT\_013986 (Resp. App. Tab 13 p. 1054); Wharves—2011 Comprehensive Annual Financial Report at BOT\_013901 (Resp. App. Tab 14 p.1093); Wharves—2012 Comprehensive Annual Financial Report at BOT\_014464 (Resp. App. Tab 15 p. 1166); Wharves—2013 Comprehensive Annual Financial Report at BOT\_014552 (Resp. App. Tab 16 p. 1254); Wharves—2014 Comprehensive Annual Financial Report at p. 3 (Resp. App. Tab 77 p. 2113).

### **C. The Galveston Cruise Terminal**

The Wharves operates a cruise terminal complex on Galveston Island which consists of two terminals (I and II) (hereinafter sometimes called the “Cruise Terminal”). (RPFF 21). Lease and Development Agreement—Cruise Terminal No. I, BOT\_018034-018054 (Resp. App. Tab 18 at p.1404); Lease and Development Agreement—Cruise Terminal No. II, BOT\_018055-018072 (Resp. App. Tab 19 at p.1425). Cruise lines which have made calls to the Cruise Terminal since its opening include Carnival Cruise Lines, Royal Caribbean Cruise Lines,

Celebrity Cruises, Princess Cruise Lines and Disney Cruise Lines. (RPFF 22) Wharves—2012 Comprehensive Annual Financial Report at BOT\_014453 (Resp. App. Tab 15 at p.1240); Wharves—2014 Comprehensive Annual Financial Report at p. vi (Resp. App. Tab 77 at p.2102); Wharves—Cruise Calls for 2004-2011, EZC000031-000038 (Resp. App. Tab 91 at p.2629-2636).

Early in its operations, these Cruise lines made more ship calls than now on an annual basis. (RPFF 23) Wharves—2008 Comprehensive Annual Financial Report at BOT\_ 014267 (Resp. App. Tab 11 at p. 969); Wharves—2009 Comprehensive Annual Financial Report at BOT\_014349 (Resp. App. Tab 12 at p.1051); Wharves—2010 Comprehensive Annual Financial Report at BOT\_014045 (Resp. App. Tab 13 at p. 1136); Wharves—2011 Comprehensive Annual Financial Report at BOT\_014437 (Resp. App. Tab 14 at p. 1139); Wharves—2012 Comprehensive Annual Financial Report at BOT\_014525 (Resp. App. Tab 15 at p.1227); Wharves—2013 Comprehensive Annual Financial Report at BOT\_014613 (Resp. App. Tab 16 at p. 1315); Wharves—2014 Comprehensive Annual Financial Report at p. 54 (Resp. App. Tab 77 at p. 2174). However, the Cruise lines have brought in and home ported larger cruise ships in Galveston, which has led to less ship calls without a corresponding reduction in passengers. (RPFF 24) *Id.* For example, in 2006 253 ship calls were recorded at the cruise terminal with 616,939 cruise passengers going through the terminal. (RPFF 25) Wharves—2008 Comprehensive Annual Financial Report at BOT\_ 014267 (Resp. App. Tab 11 at p. 969); Wharves—2009 Comprehensive Annual Financial Report at BOT\_014349 (Resp. App. Tab 12 at p.1051); Wharves—2010 Comprehensive Annual Financial Report at BOT\_014045 (Resp. App. Tab 13 at p.1136); Wharves—2011 Comprehensive Annual Financial Report at BOT\_014437 (Resp. App. Tab 14 at p.1139); Wharves—2012 Comprehensive Annual Financial

Report at BOT\_014525 (Resp. App. Tab 15 at p. 1227); Wharves—2014 Comprehensive Annual Financial Report at p. 54 (Resp. App. Tab 77 at p.2171). In 2014, the ship call count was only 181 but 641,650 passengers were recorded. (RPFF 26) *Id.* The Cruise Terminal rank 1st in Texas, 2nd in the Gulf of Mexico, 5th in the United States and 19th in the World in terms of annual cruise passenger traffic. (RPFF 27) “Galveston Cruise Terminal Expansion Moves Forward,” *Houston Business Journal*, May 28, 2015, (Resp. App. Tab 48 at p.1754); Texas Department of Transportation, Texas Ports 2013-2014 Summary & Capital Campaign at 19 (found at [http://www.recenter.tamu.edu/mdata/pdf/Texas\\_Ports\\_Summary\\_2013-14.pdf](http://www.recenter.tamu.edu/mdata/pdf/Texas_Ports_Summary_2013-14.pdf)) (Resp. App. Tab 44 at p.1734).

#### **D. Galveston Cruise Passengers**

Cruise passengers arrive at the Galveston Cruise Terminal in a variety of ways. (RPFF 28) Affidavit of Michael Mierzwa p. 8 (Resp. App. Tab 75 at p.2076-2077).

For example:

1. Some passengers park at the homes of nearby friends or family, who drop them off at the Cruise Terminal without compensation. (In this instance, no access fees are charged.) (RPFF 29) Affidavit of Mike Mierzwa at ¶ 42 Tab 77 at p. 2076).
2. Some passengers arrive on charter buses provided by the Cruise lines, as part of a "fly/cruise" package. (RPFF 31) *Id.* at ¶ 33. Buses used under such programs are exempted from the Port's Tariff, and no access fees are paid. (RPFF 32) *Id.*
3. Some passengers come to Galveston prior to their actual cruise departure date, and stay as paying guests at a local hotel. (RPFF 33) Affidavit of Steve Cunningham at ¶4 (Resp. App. Tab 88 at p.2626); Galveston.com: Enhance Your Cruise with an Overnight Stay Prior to Departure (found at <http://www.galveston.com/parkandcruise/>) (Resp. App. Tab

43 p.1712). In this case, many hotels will allow paid guests to leave their vehicle without charge on hotel property during their cruise, and will provide (either directly, or using a third party shuttle service) a courtesy van to drop the passengers off at the terminal and pick them up when they return. (RPFF 34) Affidavit of Steve Cunningham at ¶4 (Resp. App. Tab 88 at p.2626); Galveston.com: Enhance Your Cruise with an Overnight Stay Prior to Departure (found at <http://www.galveston.com/parkandcruise/>) (Resp. App. Tab 43 at p.1712). Cruise passengers are a small percentage of these hotels' overall business. (RPFF35) Affidavit of Steve Cunningham at ¶ 5 (Resp. App. Tab 88 at p.2626); Hilton Galveston Island Cruise Ship Numbers April 2013- March 2014; BOT\_012979 (Resp. App. Tab 49 at p.1757); Affidavit of Peter Simons at ¶ 5 (Resp. App. Tab 76 p.2079). For example, the Hilton on the Galveston Seawall from April 2013 to April 2014 rented fewer than 3% of its 60,000 rented and occupied rooms to cruise passengers. (RPFF 36) Hilton Galveston Island Cruise Ship Numbers April 2013- March 2014; BOT\_012979 (Resp. App. Tab 49 p.1757).

4. Other cruise passengers arrive at the Cruise Terminal in their own vehicles. (RPFF 38, Affidavit of Michael Mierzwa (Resp. App. Tab 75 p. 2076). They can park their vehicles at lots owned and operated by the Wharves, or alternatively at lots operated by private owners such as Complainants. (RPFF 39) *Id.* Passengers can make advance reservations for parking at any of these facilities online, or else simply "pay at the door" on arrival, assuming there is available space. (RPFF 40) 81<sup>st</sup> Dolphin Advertisement, Robledo\_A\_000008 (Resp. App. Tab 41 p. 1709); EZ Cruise Website—FAQ (found at <http://ezcruiseparking.com/faqs/>) (Resp. App. Tab 42 at p.1710). Both the Wharves and the private lots provide courtesy shuttle vans to take passengers to and from the Cruise

Terminal. (RPFF41) 81<sup>st</sup> Dolphin Advertisement, Robledo\_A\_000008 (Resp. App. Tab 41 p. 1709); EZ Cruise Website—FAQ (found at <http://ezcruiseparking.com/faqs/>) (Resp. App. Tab 42 at p.1710). This shuttle service is provided only to customers parking at the lot providing the service, and is provided at no additional charge. <sup>1</sup>

5. A relatively small number of cruise passengers arrive by:
  - a. taxicab - either local taxis, or taxis from other locations, such as the Houston Airports;
  - b. limousine; or
  - c. other charter bus services which are not part of the Cruise lines' Fly-Cruise packages.

(RPPF 43) Affidavit of Michael Mierzwa at ¶ 41 (Resp. App. Tab 75 at p.2076). There is no evidence that any of the entities providing taxicab, limousine or charter bus transportation to the Cruise Terminal operate parking lots similar to those operated by Complainants or the Wharves. Collectively, taxicabs, limousines and charter buses are sometimes referred to hereafter as “Transportation Services.”

6. Finally, there are probably at least some hearty cruise passengers who walk to the terminal from some other local location with their luggage in tow.

Complainants offer no evidence whatsoever that the hotels or the Transportation Services are similarly situated to them, or are otherwise in a competitive relationship with them. Rather, Complainants simply state as a "given" that they are, because they all pay access fees to the Wharves. This completely ignores the unique nature of the services they offer. (RPFF 47) Depo. Of George Templeton at 70:5-70:13 (Resp. App. Tab 83 at p.2543). Cruise passengers who drive to Galveston on cruise day cannot park at a hotel, because they did not agree to stay there as

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<sup>1</sup> There are one or two exceptions to this. Specifically, there are one or two parking lots located across Harborside Drive from the Cruise Terminal; their customers typically arrive at the Cruise Terminal on foot, carrying their luggage with them. (RPFF 42) Affidavit of Michael Mierzwa at ¶ 31 (Resp. App. Tab 75 at 2075).



paying guests. (RPFF 48) Affidavit of Steve Cunningham at ¶4 (Resp. App. Tab 88 p.2626); Galveston.com: Enhance Your Cruise with an Overnight Stay Prior to Departure (found at <http://www.galveston.com/parkandcruise/>) (Resp. App. Tab 43 at p.1712). Rather, they will most likely park in secure, fenced lots near the Cruise Terminal operated by Complainants or the Wharves.

Other cruise passengers who drive to Galveston several days prior to cruise do so to extend their vacation a few days and visit local beaches on the Gulf of Mexico, tour local examples of historic 19th Century architecture, sample fresh Gulf Coast Seafood, or pursue other recreational activities. (RPFF 49) Affidavit of Steve Cunningham at ¶ 2 (Resp. App. Tab 88 at p. 2625). Most likely, they will not live out of their car in a parking lot while doing so. (RPFF 50) Galveston.com: Enhance Your Cruise with an Overnight Stay Prior to Departure (found at <http://www.galveston.com/parkandcruise/>) (Resp. App. Tab 43 at p.1712). Rather, they will check into one of Galveston's many fine hotels for the pre-cruise portion of their vacation. *Id.* Having done so, they will likely use a complimentary cruise parking and shuttle service if offered - having already paid to stay at the hotel first. (RPFF 51) Affidavit of Steve Cunningham at ¶4 (Resp. App. Tab 88 at p.2626); Galveston.com: Enhance Your Cruise with an Overnight Stay Prior to Departure (found at <http://www.galveston.com/parkandcruise/>) (Resp. App. Tab 43 at p.1712). Complainants cannot offer any examples of hotels dedicated primarily to cruise passenger guests - because none exist.

Likewise, taxicabs and limousines provide transportation services to the public in general. Cruise passengers are, at best, an incidental portion of their customer base. (RPFF 53) Affidavit of Babak Roodi at ¶ 3 (Resp. App. Tab 85 at p.2585); Wharves—Monthly Board Meeting Minutes, February 27, 2006, at BOT\_000403 (Resp. App. Tab 85 at p.2585). The only

relevant businesses that limit the types of customers they serve are the private parking lots. That is, you do not have to be a cruise passenger to hire a taxicab or limousine or rent a room at a hotel; indeed most of their customers do not. (RPFF 54) Affidavit of Steve Cunningham at ¶4 (Resp. App. Tab 88 at p.2626); Galveston.com: Enhance Your Cruise with an Overnight Stay P. 1712); Affidavit of Babak Roodi at ¶ 3 (Resp. App. Tab 85 at p.2585). In contrast, virtually all of Complainants' customers are cruise passengers seeking to park their vehicles for the duration of their cruises. (RPFF 55) Depo of George Templeton at 24:9-24:19 (Resp. App. Tab 83p. 2519); Depo of Cynthia Tompkins at 101:8-101:11 (Resp. App. Tab 82 at p.2485).

The dissimilar nature of the hotel, parking lot and Transportation Service industries has long been recognized by the United States Government. Indeed, the North American Industry Classification System (NAICS) is the standard used by Federal statistical agencies in classifying business establishments for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. business economy. NAICS was developed under the auspices of the Office of Management and Budget (OMB), and adopted in its current form in 1997. In it, the industries discussed in this case have the following separate tracking codes:

Hotels and Motels not including casinos: 721110

Taxicabs: 485310

Limousines: 485320

Parking Lots and Garages: 812930

Airport Shuttles and the like: 485310

See [http://www.bls.gov/iag/tgs/iag\\_index\\_naics.htm](http://www.bls.gov/iag/tgs/iag_index_naics.htm). While participants in these various industries may have something in common at a global level (i.e. they must pay taxes, compensate employees, etc.), they are still inherently different, as the Federal Government expressly recognizes. In contrast, in the only case Complainants cite on this issue, *New Orleans*

*Stevedoring Co. v. Board of Commissioners*, 2001 WL 865692 (FMC 2001), the complainant and the other terminal operators it claimed were treated preferentially were all classified under NAICS Code No. 488320 - "marine cargo handling." (Judge Lange ruled that "all *marine terminal operators*, whether or not lessees [of the Port], were similarly situated..." *Id.* at \*11).

#### **E. Access Fees**

##### **1. 2003-2006: Uniform "Per Trip" Access Fees**

In 2003, the Wharves issued Tariff Circular No. 6, Item 111. This tariff describes rules and regulations for all vehicles owned by commercial entities seeking to access the Cruise Terminal to drop off and pick up cruise passengers. (RPFF 56) Wharves – Tariff Circular No. 6 (Item 111) revised November 14, 2003, at BOT\_017486-017491 (Resp. App. Tab 1 at p.16-22). Included in these regulations are fees required for accessing the terminal. (RPFF 57) *Id.*

All such commercial entities accessing the Cruise Terminal must purchase a decal for each vehicle. (RPFF 58) Wharves – Tariff Circular No. 6 (Item 111) revised November 14, 2003, at BOT\_017486-017487 (Resp. App. Tab 1 at p.16-17). To obtain the decal the owners or operators must show proof of insurance and add the Wharves and GPFC as additional insureds on their policies. (RPFF 59) Wharves – Tariff Circular No. 6 (Item 111) revised September 22, 2014, at BOT\_017861-017862 (Resp. App. Tab 6 at p.390-391). With the exception of taxicab operators, these owners and operators must also pay an access fee for each time they access the Cruise Terminal to pick up or unload passengers.<sup>2</sup> (RPFF 60) Wharves – Tariff Circular No. 6 (Item 111) revised September 22, 2014, at BOT\_017862 (Resp. App. Tab 6 at p. 391). The

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<sup>2</sup> The reasons taxicabs are not charged Access Fees are discussed more fully below. Generally, their charges are exclusively regulated by the City of Galveston. *See* RPFF 46, Affidavit of Michael Mierzwa at ¶ 46 (Resp. App. Tab 75 at p.2077); Affidavit of Margaret Benham at ¶ 5 (Resp. App. Tab 89 at p.2627); Chapter 35, Section 35.86 (Resp. App. Tab 40 at p.1706).

Wharves cannot require cruise passengers to arrive at the Cruise Terminal in commercial vehicles that pay Access Fees. (RPFF 61) GALVESTON, TEX., CHARTER, art. XII, §§ 1-2 (Comp. App. Tab 12 at p.278). As noted above, some passengers arrive on foot, or in non-commercial vehicles driven by friends or family without charge.

## **2. Negotiations Leading to the Agreed \$8 Per Space Per Month Rate for Complainants**

From 2003 through August 15, 2006, the Wharves' Tariff provided that Complainants, other private parking lots, hotels and others covered therein were to pay Access Fees at the same rate -- \$10 per trip. (RPFF 62) Wharves – Tariff Circular No. 6 (Item 111) revised November 14, 2003, at BOT\_017486-017491 (Resp. App. Tab 1 at p.16-21); Affidavit of Michael Mierzwa at ¶ 12 (Resp. App. Tab 75 at p.2071). The Wharves did not charge or seek to collect this per trip access fee until 2005, when it advised all persons and companies obligated to pay access fees under its Tariff that it would, in fact, assess and collect Access Fees (RPFF 63) Affidavit of Michael Mierzwa at ¶ 15 (Resp. App. Tab 75 at p.2072); Steven M. Cernak notice to Port users, May 20, 2005, EZC\_A\_005577-5583 (Resp. App. Tab 50 at p.1758-1764).

Additionally, the Wharves' staff collected data regarding the number of times these users actually accessed the Cruise Terminal in 2005 and through June of 2006. This data revealed that:

1. During 2005 Complainants' access compared to that of all hotels compared as follows:

EZ Cruise	2,316
EZ Cruise (Galv. Limo)	4,146 <sup>3</sup>
Lighthouse	0
81 <sup>st</sup> Dolphin	1,239
<b><u>Total</u></b>	<b><u>7,701</u></b>
 <b><u>All Hotels</u></b>	 <b><u>8,488</u></b>

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<sup>3</sup> In 2005 and 2006 EZ Cruise used Galveston Limousine Co. as a contractor to provide complimentary shuttle service for its customers, because it did not own enough vehicles. (RPFF 65) Cynthia Hayes letter dated June 14, 2005, BOT\_010819-010820 (Resp. App. Tab 51 at p.1765-1766); Depo. Of Cynthia Tompkins at 39:1-40:16 (Resp. App. Tab 82 at p. 2474).

(RPFF 64, 65) Port Tariff Charges for the Year 2005 (Access Fee Study) (Resp. App. Tab 58 at p.1790); Cynthia Hayes letter dated June 14, 2005, BOT\_010819-010820 (Resp. App. Tab 51 at p.1765); Depo. Of Cynthia Tompkins at 39:1-40:16 (Resp. App. Tab 82 at p.2474). In the first six months of 2006, Complainants had more trips to and from the Cruise Terminal than all of the hotels combined:

EZ Cruise	1,669
EZ Cruise (Galv. Limo)	1,297 (thru March)
Lighthouse	1,423
81 <sup>st</sup> Dolphin	1,304
<b><u>Total</u></b>	<b><u>5,693</u></b>
<b><u>All Hotels (13)</u></b>	<b><u>5,135</u></b>

(RPFF 64, 65) *Id.*

From January 2005 through August 2006, Complainants were invoiced for Access Fees on a per trip basis, but refused to pay the full amounts owed. (RPFF 72) Steven Cernak July 29, 2005, letter to EZ Cruise, BOT\_011064-011068 (Resp. App. Tab 50 at p.1768-1772); Cynthia Hayes (Tompkins) October 15, 2005, letter to Wharves, BOT\_010815 (Resp. App. Tab 53 at p.1773); R. Wayne Byrd August 16, 2006, letter to EZ Cruise, BOT \_010845 (Resp. App. Tab 56 at p.1787); Michael Mierzwa July 20, 2006, letter to EZ Cruise, BOT\_010816-010820 (Resp. App. Tab 54 at p.1774-1778); Michael Mierzwa July 25, 2006, letter to Lighthouse Parking, BOT\_010832-010839 (Resp. App. Tab 55 at p.1779-1786). Rather than banning them from the Cruise Terminal, the Wharves continued to try to work with them to reach an agreement under which they would pay their Access Fees. (RPFF 73- 74) Steven Cernak July 29, 2005, letter to EZ Cruise, BOT\_011064-011068 (Resp. App. Tab 52 at p.1768-1772); Cynthia Hayes (Tompkins) October 15, 2005, letter to Wharves, BOT\_010815 (Resp. App. Tab 53 at p.1773); R. Wayne Byrd August 16, 2006, letter to EZ Cruise, BOT \_010845 (Resp. App. Tab 56 at

p.1787); Michael Mierzwa July 20, 2006, letter to EZ Cruise, BOT\_010816-010830 (Resp. App. Tab 54 at p.1774-1778); Michael Mierzwa July 25, 2006, letter to Lighthouse Parking, BOT\_010832-010839 (Resp. App. Tab 55 at p.1779-1786); Cynthia Hayes (Tompkins) June 14, 2005, letter to Wharves, BOT\_010819-010820 (Resp. App. Tab 51 at p.1765-1766). During discussions on this issue, Complainants complained that the Access Fees were too high, and could vary significantly from month to month. *Id.* They asked to be treated differently from other users and pay some type of flat rate for unlimited access. (RPFF 75) Cindy Hayes letter dated June, 14, 2005, BOT\_010819 (Resp. App. Tab 51 at p.1765-66); Cindy Hayes letter dated October 15, 2005, BOT\_010815 (Resp. App. Tab 55 at p.1773); Michael Mierzwa letter date July 20, 2006, BOT\_010816-010818 (Resp. App. Tab 54 at p.1774-1778); Depo. of George Templeton at 40:12-40:25 (Resp. App. Tab 83 at p.2531); "Shuttle Diplomacy" Article in July 31, 2006, edition of The Daily News, EZC\_A\_001811-001813 (Resp. App. Tab 47 p. 1751-1753); Depo. Of Sylvia Robledo at 63:2-63:4 (Resp. App. Tab 80 at p.2321). In the Fall of 2005 EZ Cruise owner Cynthia Tompkins (formerly Cynthia Hayes) wrote to (then) Deputy Port Director Michael Mierzwa asking that EZ Cruise be charged an access fee of \$1,000 per month for unlimited access to the Cruise Terminal. (RPFF 76) Cindy Hayes letter dated October 15, 2005, BOT\_010815 (Resp. App. Tab 53 at p.1723). The Complainants met many times with Wharves' staff in late 2005 through June of 2006, still refusing to pay an access fee on a "per trip" basis. (RPFF 77) Cindy Hayes letter dated June, 14, 2005, BOT\_010819 (Resp. App. Tab 53 at p. 1723); Cindy Hayes letter dated October 15, 2005, BOT\_010815 (Resp. App. Tab 51 at p.1765); Michael Mierzwa letter date July 20, 2006, BOT\_010816-010818 (Resp. App. Tab 54 at p.1774-1777); Depo. of George Templeton at 40:12-40:25 (Resp. App. Tab 83 at p.2531); "Shuttle Diplomacy" Article in July 31, 2006, edition of The Daily News, EZC\_A\_001811-

001813 (Resp. App. Tab 47 p. 1751-1753). After protracted negotiation, the Complainants and the Wharves staff agreed on a simple fee formula – the Complainants would be charged a flat dollar rate per month for each space in their lots used for cruise passenger parking. (RPFF 78) Wharves – Tariff Circular No. 6 (Item 111) revised November 14, 2003, at BOT\_017486-017491 (Resp. App. Tab 1 at p.16-21); Affidavit of Michael Mierzwa at ¶ 12 (Resp. App. Tab 75 at p.2071); Affidavit of Michael Mierzwa at ¶ 18 (Resp. App. Tab 75 at p.2072). Ultimately, the Wharves decided on a rate of \$8 per space per month. (RPFF 79) Depo. of George Templeton at 40:12-40:25 (Resp. App. Tab 83 at p.2531). As Complainants admitted, this was a “deal.” (RPFF 80) *Id.* In fact, it was the best deal they thought they could get. *Id.* This agreed upon rate was put into effect on August 15, 2006. (RPFF 81) Affidavit of Michael Mierzwa at ¶ 21 (Resp. App. Tab 75 at p.2072). This \$8 rate was applied retroactively to January 1, 2005 - but only for these Complainants. During the same time period, the hotels and others assessed Access Fees paid the full amount due. (RPFF 82) (Commodore Access Fees at BOT\_015921 (Comp. App. Tab 46 at p.771); County Inn Access Fees at BOT\_015951 (Comp. App. Tab 47 at p.801); Marriott Access Fees at BOT\_015983 (Comp. App. Tab 48 at p.833); Fertitta Access Fees at BOT\_016196 (Comp. App. Tab 49 at p.855); Galveston Beach Hotel Access Fees at BOT\_016263 (Comp. App. Tab 50 at p.922); Hampton Inn Access Fees at BOT\_016274 (Comp. App. Tab 51 at p.933); Holiday Inn Access Fees at BOT\_016322 (Comp. App. Tab 52 at p.982); Holiday Inn (Sunspreet Resort) Access Fees at BOT\_016380 (Comp. App. Tab 53 at p.1039); Galvez Hotel Access Fees at BOT\_016442 (Comp. App. Tab 54 at p.1101); Inn at the Waterpark Access Fees at BOT\_016558 (Comp. App. Tab 55 at p.1217); Island Breeze Shuttle Access Fees at BOT 016569 (Comp. App. Tab 56 at p.1228); LaQuinta Hotel Access Fees at BOT 016580 (Comp. App. Tab 57 at p.1239); Moody Gardens Access Fees at BOT\_016798

(Comp. App. Tab 58 at p.1346); San Luis Hotel Access Fees at BOT\_016922 (Comp. App. Tab 59 at p.1465); Tremont Hotel Access Fees BOT\_017039 (Comp. App. Tab 60 at p.1582).

Complainants achieved significant savings, as a result:

Complainant	Period	A	B	A - B	Reference
		Access Fee at \$10/Trip	Access Fee at \$8/Parking Space	Complainant Savings Under Fixed Rate of \$8/Parking Space	
EZ Cruise	January 2005 - June 2006	\$ 87,930	\$ 35,680	\$ 52,250	Exhibit A1
Lighthouse	January 2006 - June 2006	\$ 14,230	\$ 9,120	\$ 5,110	Exhibit A2
81st Dolphin	July 2005 - June 2006	\$ 25,430	\$ 11,520	\$ 13,910	Exhibit A3

(RPFF 83-86) Rebuttal Report of Jeffrey Compton (Resp. App. Tab 7 at p.407); Affidavit of Jeffrey Compton at ¶40 and Exhibits C1, C2 and C3 (Resp. App. Tab 103 p. 2766, 2773-2775).

**3. Access Fees 2006 through 2014**

The Wharves Board of Trustees approved this agreement, and the Tariff was modified to reflect that Complaints and other private parking lot owners would pay \$8 per space per month as "Off-Port Parking Users."<sup>4</sup> (RPFF 87) Wharves – Tariff Circular No. 6 (Item 111) revised August 28, 2006, at BOT\_0017559-017565 (Resp. App. Tab 2 at p.91-92); Affidavit of Michael Mierzwa at ¶ 19 (Resp. App. Tab 75 at p.2072). The 2006 Tariff revision also provided for increases based on the Consumer Price Index beginning in 2011. However, the Wharves did not implement this increase, pending an overall study of Cruise Terminal finances and access fees, which led so the 2014 changes to the Wharves' Tariff. (RPFF 90) Affidavit of Peter Simons at ¶ 3 (Resp. App. Tab 76 p. 2078); Affidavit of Michael Mierzwa at ¶ 27 (Resp. App. Tab 75 at p.2073).

<sup>4</sup> One of the Trustees who voted for this change was Don Suderman. His wife owns a fifty percent (50%) interest in Complainant Lighthouse Parking, Inc. (RPFF 88) Depo of George Templeton at 48:13-49:16; Lighthouse Stock Purchase and Sale Agreement, L.T. 001142-001146 (Exhibit No. 43 of Deposition) (Resp. App. Tab 83 at p. 2536-2537, 2555a). This fact was not disclosed to other Board members at that time.



From August 15, 2006, through October 1, 2014 the Access Fees charged to Complainants and other private parking lot owners did not change. (RPFF 91) Wharves – Tariff Circular No. 6 (Item 111) revised August 28, 2006, at BOT\_017561 (Resp. App. Tab 2 at p.91-92); Wharves – Tariff Circular No. 6 (Item 111) revised December 17, 2007, at BOT\_017637 (Resp. App. Tab 3 at p.167). For others paying Access Fees on a per-trip basis, changes were made to the Tariff in 2007 to delineate per trip fees on the basis of the passenger capacity of the shuttle vans accessing the Cruise Terminals.<sup>5</sup> (RPFF 98) Wharves – Tariff Circular No. 6 (Item 111) revised December 17, 2007, at BOT\_017637 (Resp. App. Tab 3 at p.167). This change did not affect the Access Fees which Complainants paid. (RPFF 101) Wharves – Tariff Circular No. 6 (Item 111) revised December 17, 2007, at BOT\_017637 (Resp. App. Tab 3 at p.167); Depo of George Templeton at 41:19-42:6 (Resp. App. Tab 83 at p.2532). From August 1, 2006 through May of 2014 two constants were in place: 1) Complainants knew and were aware of the \$8 per space per month rate they were charged, while others paid a per-trip fee, and 2) Complainants never complained once that the rate they were being charged was unfair, discriminatory or prejudicial. (RPFF 102-103) Wharves – Tariff Circular No. 6 (Item 111) revised August 28, 2006, at BOT\_017561 (Resp. App. Tab 2 at p.91); Wharves – Tariff Circular No. 6 (Item 111) revised December 17, 2007, at BOT\_017637 (Resp. App. Tab 3 at p.167); Affidavit of Michael Mierzwa at ¶ 23 (Resp. App. Tab 75 at p.2073); Email Correspondence from Jason Hayes to Bernie Curran, BOT\_011101-011102 (Resp. App. Tab 92 at p.2637).

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<sup>5</sup> Despite the change, the Port did not receive the benefit of this change until after the 2013 -2014 review of cruise terminal access issues by Port staff (discussed below) disclosed an inadvertent failure to collect the higher amounts charged for larger buses and shuttle vans required by the amended Tariff. Specifically the employee responsible for counting vehicles accessing the terminal apparently was not aware of the higher rates, and charged all such vehicles a \$10 access fee per trip regardless of size - in violation of the Tariff. As a result, some commercial users paying access fees on a per-trip basis were charged less than they should have been charged. This oversight was corrected in August 2014, when a new employee took over the position. (RPFF 99) Affidavit of Mark Murchison at ¶ 23 (Resp. App. Tab 77 at p.2073).

#### **4. Events Leading to the 2014 Access Fee Increases**

In late 2013, Wharves Staff proposed several revisions to Tariff Circular No. 6, which included an increase in the Access Fees paid by Complainants and other private parking lot owners, to \$9.14 per space, beginning in 2014. (RPFF 104) Affidavit of Michael Mierzwa at ¶ 28 (Resp. App. Tab 75 at p. 2074). The Board of Trustees approved other revisions, but deferred the Access Fee increase. (RPFF105) *Id.*; Wharves—Monthly Board Meeting Minutes, November 21, 2013, BOT\_002739-002789 (Resp. App. Tab 92 at p.2637-2638).

Although the Access Fee increase was deferred, the change was inadvertently included in actual revisions made to the Tariff in November 2013. (RPFF 106) Affidavit of Michael Mierzwa at ¶ 28 (Resp. App. Tab 75 at p. 2074). Since the change was not formally approved by the Board of Trustees, it was not legally valid. When the error was discovered it was corrected. (RPFF 106) Affidavit of Michael Mierzwa at ¶ 28 (Resp. App. Tab 75 at p. 22074). Rather, the Board of Trustees directed Wharves staff to conduct a complete review of Cruise Terminal finances and operations, including security, access gates, pedestrian traffic, access by ground transportation companies, and develop a true picture of the financial condition and operation of the Cruise Terminal. (RPFF 107) Affidavit of Peter Simons at ¶ 3 (Resp. App. Tab 76 at p.2078); Affidavit of Mark Murchison at ¶ 17 (Resp. App. Tab 77 at p.2085); Affidavit of Michael Mierzwa at ¶ 27 (Resp. App. Tab 75 at p.2073).<sup>6</sup>

The study showed that the costs and expenses incurred by the Wharves and GPFC greatly exceeded their revenues attributable to the Cruise Terminal. (RPFF 108) Affidavit of

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<sup>6</sup> That same study also determined that limousines were not being charged as well. Prior to Hurricane Ike's landfall on September 13, 2008, limousines were charged as per the tariff. As noted even by Complainants access by limousines is extremely small in number compared to other users (297 in 2014 when compared to the unlimited trips made by Complainants). Given past history, the loss of revenue was extremely small. However, as part of this 2013-2014 staff study, the Wharves resolved to enforce access rates on limousines after replacing the person at the entrance gate in August of 2014. Unfortunately, efforts to collect against these companies persist, with a number refusing to service the terminal if they must pay a fee. Affidavit of Mark Murchison at ¶ 25 (Resp. App. Tab 77 at p. 2086). The matter is still under review.

Michael Mierzwa at ¶ 30; Board of Trustees—Regular Monthly Meeting Minutes, May 19, 2014, at BOT\_000085-000086 (Comp. App. Tab 25 at p.479-480). Following completion of this study, Port staff recommended that the per trip fee rate be increased. (RPFF 109) Affidavit of Michael Mierzwa at ¶ 30 (Resp. App. Tab 75 at p.2); Board of Trustees—Regular Monthly Meeting Minutes, May 19, 2014, at BOT\_000092 (Comp. App. Tab 5 at p.486); Wharves – Tariff Circular No. 6 (Item 111) revised May 19, 2014, at BOT\_017793 (Resp. App. Tab 5 at p.322). The lower \$10 trip charge was indexed to the Consumer Price Index and rounded up to \$20. (RPFF110) Wharves—CPI-U Calculation, BOT\_018097 (Resp. App. Tab 101 at p.2754). The higher trip charges for larger shuttle vans and buses were also increased. (RPFF 111) Wharves – Tariff Circular No. 6 (Item 111) revised May 19, 2014, at BOT\_017793 (Resp. App. Tab 5 at p.322). Nevertheless, a significant deficit remained. In order to close the financial gap, the per-space access fees for parking lot owners and operators was increased. (RPFF 113) Affidavit of Michael Mierzwa at ¶ 31 (Resp. App. Tab 75 at p.2074-2075); Affidavit of Mark Murchison at ¶ 13 (Resp. App. Tab 77 at p.2084). In doing so, the Port allocated approximately 68% of the remaining deficit, to itself, as it operated 68% of the parking lots servicing cruise passengers (RPFF 114) Affidavit of Michael Mierzwa at ¶ 31 (Resp. App. Tab 75 at p.2074-2075); Access Fee Study Group Presentation (Comp. App. Tab 20 at p.438); Affidavit of Mark Murchison at ¶ 13 (Resp. App. Tab 77 at p.2084).<sup>7</sup> This resulted in an increase parking lot Access fees to \$28.88 per space per month, following which Complainants filed this proceeding. (RPFF 116) Wharves – Tariff Circular No. 6 (Item 111) revised May 19, 2014, at BOT\_017793

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<sup>7</sup> The Port also allocated to itself the parking spaces in private lots who did not pay Access fees, because they are in closer proximity to the Port, and their customers simply walk to the Cruise Terminal complex. (RPFF 115) Affidavit of Michael Mierzwa at ¶ 31 (Resp. App. Tab 75 at p.\_\_\_\_); Access Fee Study Group Presentation (Comp. App. Tab 20 at p.438); Affidavit of Mark Murchison at ¶ 13 (Resp. App. Tab 77 at p. 2071).

(Resp. App. Tab 5 at p.322); Affidavit of Mark Murchison at ¶ 13 (Resp. App. Tab 77 at p.2084).

After attempts at mediation of this proceeding, the Wharves retroactively rescinded the May 2014 Tariff rate increase for Off-Port Parking Users. (RPFF 117) Affidavit of Mark Murchison at ¶ 19 (Resp. App. Tab 77 at p. 2085). The Tariff was again modified, and the "per space per month" method for calculating parking lot Access Fees was eliminated, effective October 1, 2014. (RPFF 119) Wharves – Tariff Circular No. 6 (Item 111) revised September 22, 2014, at BOT\_017862 (Resp. App. Tab 6 at p.391). In its place, all persons paying Access Fees now pay on a per-trip basis. *Id.* As of October 1, 2014, Complainants were charged on the exact same basis, \$20 per trip, as all other users. (RPFF 120) Wharves – Tariff Circular No. 6 (Item 111) revised September 22, 2014, at BOT\_017862 (Resp. App. Tab 6 at p.391); Affidavit of Michael Mierzwa at ¶ 32 (Resp. App. Tab 75 at p.2075).

## II. STANDARD OF REVIEW

Complainants Claims are governed by the Commission's decision in *Ceres Marine Terminal*. In *Ceres*, the Federal Maritime Commission ("Commission") provided that:

In order to establish an allegation of an unreasonable preference or prejudice, it must be shown that (1) the two parties are similarly situated or in a competitive relationship, (2) the parties were accorded different treatment, (3) the unequal treatment is not justified by differences in transportation factors, and (4) the resulting prejudice or disadvantage is the proximate cause of the injury. The complainant has the burden of proving that it was subjected to different treatment and was injured as a result and the respondent has the burden of justifying the difference in treatment based on legitimate transportation factors.

*Ceres Marine Terminal v. Maryland Port Administration*, 27 S.R.R. 1251, 1270-1271 (1997), *aff'd in part, rev'd in part on other grounds sub nom. Maryland Port Admin. v. Federal Maritime Commission*, 164 F.3d 624, 1998 WL 716035 (4th Cir. Oct. 13, 1998). The decision in *Ceres* states that the "complainant has the burden of proving that it was subjected to different treatment

and was injured as a result and the respondent has the burden of justifying the difference in treatment based on legitimate transportation factors." *Ceres*, 27 S.R.R. at 1270-71 (citing *Cargill, Inc. v. Waterman Steamship Corp.*, 21 S.R.R. 287 (FMC 1981)). The decision in *Cargill* states:

the complainant is not obligated to prove that the transportation circumstances ... are identical. This evidence is primarily in the possession of the respondent. It is sufficient that the complainant demonstrate that *there are no obvious differences between the trades*. At that point, the burden is upon the respondent to demonstrate that there are legitimate transportation differences.

*Cargill*, 21 S.R.R. at 301 (emphasis added).

As to those issues that fall within the business decisions of the Wharves, deference must be given. The Commission has previously stated, when discussing granting deference to a port's business decisions, that it will not substitute its business judgment for that of the port when the complained-of policy or practice and resulting disparate treatment are not unreasonable. *Petchem, Inc. v. Canaveral Port Authority*, 23 S.R.R. 974, 987 (FMC 1986) *aff'd sub. nom.*, *Petchem, Inc. v. Federal Maritime Comm'n.*, 853 F.2d 958 (D.C. Cir. 1988); *Flanagan Shipping Corp. v. Lake Charles Harbor and Terminal Dist.*, 27 S.R.R. 1123 (1997).

A complainant alleging a violation of the Shipping Act "has the initial burden of proof to establish the [violation]. The applicable standard of proof is one of substantial evidence, an amount of information that would persuade a reasonable person that the necessary premise is more likely to be true than to be not true." *AHL Shipping Company v. Kinder Morgan Liquids Terminals, LLC*, FMC No. 04-05, 2005 WL 1596715, at \*3 (ALJ June 13, 2005). However, findings may not be drawn from mere speculation. *Waterman Steamship Corp. v. General Foundries, Inc.*, 26 S.R.R. 1173, 1180 (ALJ 1993), *adopted in relevant part*, 26 S.R.R. 1424 (1994).

### **III. COMPLAINANTS FAIL TO IDENTIFY ANY SHIPPING ACT VIOLATIONS BY GPFC**

Complainants do not identify any specific acts by GPFC which form the basis of its Complaint. As discussed above, GPFC does not submit any charges or invoices to Complainants which they are required to pay. GPFC did not invoice or collect the Access Fees forming the basis of Complainants' claims. GPFC has no tariff. Thus, in terms of *Ceres*, Complainants were not subject to any "treatment" by GPFC - prejudicial or otherwise. Thus, their claims against GPFC should be dismissed.

### **IV. RESPONDENTS DID NOT ENGAGE IN UNREASONABLE PRACTICES WHICH VIOLATED 46 U.S. CODE § 41106 (2)**

Complainants assert that Respondents violated 46 U.S. Code § 41106 (2) of the Shipping Act of 1982.

#### **1. Complainants Cannot Establish the Elements of *Ceres* Because They Are not “Similarly Situated” Or In a Competitive Relationship With Other Ground Transportation Companies**

The first element of a *prima facie* case under *Ceres* is that the Complainants must prove that they are similarly situated or in a competitive relationship with the allegedly favored parties.

Complainants assert that each of type commercial business (parking lots, hotels, taxicabs, limousines and buses) are similarly situated and in a competitive relationship by the mere fact they seek access to the Cruise Terminal. (Complainant's Brief at p. 14). Complainants are forced to grossly oversimplify its description of these various types of businesses in this manner because they have nothing else. In *Ceres*, the issue was whether one marine terminal operator (Ceres) was "similar situated" to another marine terminal operator (Maersk) when the latter (Maersk) was also a common carrier. Here Complaints own and operate off-Port parking lots. There is no evidence of any of the taxicab, limousine or bus companies at issue own parking lots.

Further, while many hotels own parking lots, they do not offer paid parking to cruise passengers; rather, they allow paying hotel guests who leave to go on a cruise to park for free until they return, as an amenity. (RPFF 33-34) Affidavit of Steve Cunningham at ¶4 (Resp. App. Tab 88 at p.2626); Galveston.com: Enhance Your Cruise with an Overnight Stay Prior to Departure (found at <http://www.galveston.com/parkandcruise/>) (Resp. App. Tab 43 at p.1712-1714). Complainants urge the ALJ to adopt a meaning of “similarly situated” based on case law involving shippers seeking to transport a commodity – whether with a common carrier or involving the loading and unloading of such commodity at a marine terminal facility. Notwithstanding the lack of legal precedence holding cruise ship passengers to be nothing more than the equivalent of a “commodity” this view is simply factual inapposite to the facts of this case.

The simple fact is that the businesses to which Complainants seek to compare themselves are dramatically different. Complainants are primarily in the parking lot business. They charge for parking. They do not charge for the transportation of a customer and his or her luggage to and from the Cruise Terminal. 81<sup>st</sup> Dolphin Advertisement, Robledo\_A\_000008 (Resp. App. Tab 41 p. 1708); EZ Cruise Website—FAQ (found at <http://ezcruiseparking.com/faqs/>) (Resp. App. Tab 42 at p.1710); Depo of George Templeton at 43:15-43:22 (Resp. App. Tab 83 at p.2534) No one is transported by Complainants unless they park at their lots. (RPFF 55) Depo of George Templeton at 24:9-24:19 (Resp. App. Tab 83 at p. 2519); Depo of Cynthia Tompkins at 101:8-101:11 (Resp. App. Tab 82 at p.2485). Hotels are primarily engaged in the business of lodging. If the Cruise Terminal closed these hotels would still be primarily engaged in the business of lodging. As noted, the Hilton reported to the Wharves in 2014 that less than 3% of its lodgers were cruise passengers. (RPFF 36) Hilton Galveston Island Cruise Ship Numbers April 2013-

March 2014; BOT\_012979 (Resp. App. Tab 82 at p.1757). In contrast, virtually all of Complainants' customers are cruise passengers. Complainants offer no evidence that any particular hotel's parking spaces are exclusively used for cruise passengers.

As noted in the Order on Pending Motions and Partial Dismissal previously entered in this proceeding:

The Complaint alleges that: (I) there are at least two classes of parties similarly situated to or in a competitive relationship with Complainants- (a) the hotels that rent parking spaces for the duration of a cruise and provide shuttle service to the Cruise Terminal; and (b) the "V.I.P." lots that rent parking spaces for the duration of a cruise but do not provide shuttle service to the Cruise Terminal - that (2) were accorded different treatment from Complainants - they were not charged an access fee - and (4) the resulting prejudice or disadvantage is the proximate cause of injury to Complainants.

Order on Pending Motions and Partial Dismissal at p. 16. Complainants have not submitted any evidence of hotels that rent spaces for the duration of a cruise. The only evidence is that paying hotel guests - who would pay regardless of subsequent cruise parking - are allowed to park at the hotel without charge while on their cruise. Affidavit of Steve Cunningham at ¶4 (Resp. App. Tab 88 at p.2626); Galveston.com: Enhance Your Cruise with an Overnight Stay Prior to Departure (found at <http://www.galveston.com/parkandcruise/>) (Resp. App. Tab 43 at p.1712-1714). Additionally, the "V.I.P. Lots" Complainants referred to do not pay Access fees because *they do not access the Cruise Terminal*. Rather, their customers *walk* to the terminal. (RPFF 115) Affidavit of Michael Mierzwa at ¶ 31 (Resp. App. Tab 75 at p.2074-2075); Access Fee Study Group Presentation (Comp. App. Tab 20 at p.438); Affidavit of Mark Murchison at ¶ 13 (Resp. App. Tab 77 at p.2084). Complainants simply cannot assert unfair prejudice in Access Fee charges by comparing themselves to persons who do not access the Terminal.

Furthermore, there is no evidence that any taxicabs accessing the Cruise Terminal also own parking lots. Thus, taxicabs do not charge a fee for parking. Rather, they charge for



transporting a customer to whatever location requested. Taxicabs do not devote 100% of their business activities to taking individuals to the Cruise Terminal. They are regulated by the City of Galveston and cannot pass on any fee or rate higher than what the city allows. (RPFF 46) Affidavit of Michael Mierzwa at ¶ 46 (Resp. App. Tab 75 at p.2077); Affidavit of Margaret Benham at ¶ 5 (Resp. App. Tab 20 at p.2627); Chapter 35, Section 35.86 (Resp. App. Tab 40 at p.1706). As noted from the attached affidavit of Margaret Benham owner of Tropical Taxi, because of this regulation, her company could not pass on an access fee if charged. *Id.* Her drivers could not make money taking passengers to the terminal. *Id.* The evidence also reflects that in order to efficiently move customers through the terminal, the Wharves needs up to 100 taxicabs to go through each cruise day. If the taxicabs were not there, these customers would have to exit the terminal on foot, crossing Harborside to find a taxicab waiting there because they would be unwilling to go into the terminal and lose money. Affidavit of Mark Murchison at ¶ 27 (Resp. App. Tab 77 at 2087). Not only is this dangerous, but it creates a logistical nightmare for traffic control. *Id.*

Limousines and coach buses are typically from out of town. Affidavit of Mark Murchison at ¶ 24 (Resp. App. Tab 77 at p. 2086). These companies charge a fee to transport passengers. *Id.* They are not in the parking lot business. *Id.* Complainants offer no evidence that there are any limousine or coach bus companies that operate parking lots. Limousines and coach buses access the Cruise Terminal sporadically – from a few time a year to a two times a month. *Id.* It is very difficult to collect from these companies. Affidavit of Mark Murchison at ¶ 25 (Resp. App. Tab 77 p.2086). Complainants offer no evidence that any commercial buses or limousines seek access to the Cruise Terminal on more than a sporadic or occasional basis.

Complainants are in the parking lot business. They do not charge passengers to take them to the Cruise Terminal. 81<sup>st</sup> Dolphin Advertisement, Robledo\_A\_000008 (Resp. App. Tab 41 at p.1709); EZ Cruise Website—FAQ (found at <http://ezcruiseparking.com/faqs/>) (Resp. App. Tab 42 at p. 1710). They advertise this as a courtesy. *Id.* The vast majority of Complainants' business consists of parking cruise passenger vehicles in their lots. Depo of George Templeton at 24:9-24:19 (Resp. App. Tab 83 at p. 2519); Depo of Cynthia Tompkins at 101:8-101:11 (Resp. App. Tab 82 at p. 2485). The fee they charge is for parking. *Id.* Further, as the 2005 and 2006 data reflects, the three Complainants run more vehicles to the Cruise Terminal than any other type of business. Complainants cite no evidence that they are required to access the Cruise Terminal. They do it to enhance their business, that is, to offer the additional service to entice customers to park with them instead of the Wharves' Lots A and B. Complainants admit that the Wharves' lots are their main competition and they have always charged less than the Port while allowing their customers to avoid having to go through the terminal to drop off their luggage before parking. However, the Commission has long held that the Shipping Act does not apply to claims of "self preference." *United States Lines, Inc. v. Maryland Port Administration*, 23 F.M.C. 448, 472 (1980), ) (citing *Anglo-Canadian Ship. Co. v. Mitsui S.S. Co.*, 4 F.M.B. 535, (1955).)). The economic differences in the type of cruise passenger distinguishes each type of commercial enterprise accessing the terminal. What respondents cannot and do not show is how their businesses actually compete against any of these other businesses. They offer no evidence to prove that a hotel guest would park at their lot instead of a hotel lot; or that a passenger taking a taxicab or limousine or bus to the Cruise Terminal would have driven a car to Complainants' lots instead and used their services. Thus, the different groups of entities accessing the Cruise

Terminal are each vying for a different type of customer, and each is seeking a different type of customer and receiving remuneration from that customer on a different basis.

**2. Having Requested a Change from "Per Trip" to a Flat Rate, Complainants Cannot Now Assert Prejudice.**

Complainants contend that Wharves charged them “a rate dissimilar from that charged to other Cruise Terminal users” such as hotels, taxicabs, limousines and Buses (Complainants’ Brief at 17). Complainants and Respondents each agree that, from August 2006 through September 2014, Complainants were charged a rate dissimilar from that charged to other Cruise Terminal users. Complainants fail to note that they were charged differently because *they asked* to be treated differently. Cindy Hayes letter dated June, 14, 2005, BOT\_010819 (Resp. App. Tab 51 at p.1765-66); Cindy Hayes letter dated October 15, 2005, BOT\_010815 (Resp. App. Tab 55 at p.1773); Michael Mierzwa letter date July 20, 2006, BOT\_010816-010818 (Resp. App. Tab 54 at p.1774-1778); Deposition of George Templeton at 40:12-40:25 (Resp. App. Tab 83 at p. 2531); “Shuttle Diplomacy” Article in July 31, 2006, edition of The Daily News, EZC\_A\_001811-001813 (Resp. App. Tab 47 p. 1751-1753); Deposition of Of Sylvia Robledo at 63:2-63:4 (Resp. App. Tab 80 at p. 2321). Complaints also fail to establish that the Wharves’ conduct constituted an unreasonable preference or prejudice. *Maier v. Port Authority of NY and NJ* (Docket No. 08-03, December 17, 2014),).

As the Commission has held, all preferences and advantages are not unlawful. It is only those that are “undue” or “unreasonable” which are prohibited. *See Perry's Crane Service v. Port of Houston Authority*, 19 F.M.C. 548, 551-2 (1977);); *Seacon Terminals, Inc. v. Port of Seattle*, 26 S.R.R. 886 (FMC, 1993).). In their Brief and supporting evidence, Complainants wholly fail to disclose to the Commission that they were the ones who asked for and received the different

treatment under the Wharves' Tariff.<sup>8</sup> *See paragraph up supra*. Thereafter, and not surprisingly, they paid the Access Fees based on the change they requested for almost nine years before raising a claim that it was prejudicial.<sup>9</sup>

The Wharves began invoicing Complainants for Access Fees on the same "per-trip" basis as everyone else in 2005. Complainants flatly refused to pay these fees. Cynthia Tompkins, a principal owner of EZ Cruise wrote a letter to the Port Director and stated:

As President and Manager of EZ Cruise Parking, I write to you in regard to the fees assessed to us, as required by Tariff Item No.111.of the Port User license. Currently, we are being charged a \$10.00 per Access/Trip fee. We believe that current fee is too high and would greatly affect our ability to provide a quality service to the thousands of customers who come to Galveston each year to experience a cruise and the many other attractions Galveston has to offer.

I propose that our current fees be adjusted to flat rate of \$1,000.00 per month for all shuttles used by EZ Cruise Parking, beginning January 2005. The flat fee is much easier for a startup company, such as ours to budget and reflect expenses for reports at our monthly shareholder meetings. Billing 6 or 7 months at time is extremely burdensome to a small, start-up company.

10/15/2005 LETTER TO CERNAK FROM EZ CRUISE BOT\_010815 (Resp. App. Tab 53 at p. 1773). Mr. Templeton of Lighthouse Parking and MSylvia Robledo of 81<sup>st</sup> Dolphin Parking confirm that they "all wanted it." Deposition of Of Sylvia Robledo at 63:2-63:4 (Resp. App. Tab 80 at p. 2321); Deposition of George Templeton at 40:12-40:25 (Resp. App. Tab 83 at p. 2531). After months of negotiations and deliberations the compromise of \$8 per space per month was reached. As both Mr. Templeton and MSylvia Robledo admitted it was a "deal." *Id.* When the

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<sup>8</sup> It is not accidental that Complainants are attempting to calculate their damages from the 2007 amendments to Tariff Circular No. 6, Item 111. It is also no accident that Complainants failed to apprise the ALJ of the 2005 negotiations and deal, and Complainants admissions regarding same in their depositions. They are hoping that somehow the ALJ will fail to be told or will simply ignore the truth of the flat rate fee set in motion at their request the year before. To ask for this flat rate fee and operate under it for 8 years and to then try to cover up the reason it was put into effect is simply disingenuous.

<sup>9</sup>Plaintiffs' prior complaint was that the May 2014 Tariff Amendment, which increased the Off-Port Parking User Access Fee from \$8 to \$28.88 per space per month, was prejudicial. The first time they asserted a claim asserting they were prejudiced by the earlier \$8 rate was in their Brief filed May 1, 2015. In their First Amended Verified Complaint, their only reference to it describes it as "equitable." *First Amended Complaint* at p. 17.

Wharves’ Board of Trustees approved the negotiated deal, Port Director Steven Cernak summarized the negotiations as follows:

Mr. Cernak responded that Port staff met over the past month with the hotel/motel groups as well as the private parking lot owners to discuss the past due balances that have accrued over the last two years, as well as the need to pay ongoing charges. ...There is a Tariff item on the agenda today to modify shuttle bus operators to a monthly flat fee that staff is proposing as part of the solution.

Minutes of Board Meeting of August 28, 2006, BOT\_000514 (Resp. App. Tab 25 at p. 1517)

Respondents’ expert witness<sup>10</sup>, Jeffery Compton, CPA reviewed the data regarding charges under both the \$10 per trip and \$8 per space tariffs and found that the Complainants obtained a significant windfall.

As summarized below, a fixed rate of \$8 per parking space was to Complainants’ benefit, resulting in **lower** access fees payable by Complainants during this period, than those that would have been due under a per trip access fee of \$10 per trip.

Complainant	Period	A	B	A - B	Reference
		Access Fee at \$10/Trip	Access Fee at \$8/Parking Space	Complainant Savings Under Fixed Rate of \$8/Parking Space	
EZ Cruise	January 2005 - June 2006	\$ 87,930	\$ 35,680	\$ 52,250	Exhibit A1
Lighthouse	January 2006 - June 2006	\$ 14,230	\$ 9,120	\$ 5,110	Exhibit A2
81st Dolphin	July 2005 - June 2006	\$ 25,430	\$ 11,520	\$ 13,910	Exhibit A3

Rebuttal Report of Jeffery Compton, CPA (Resp. App. Tab 7 p. 405) and Affidavit of Jeffrey Compton Paragraph 40 (Resp. App. Tab 103, p.2766). This rate did not prejudice them, it benefited them. This is why for 8 years they operated under this tariff rate without formal complaint.

<sup>10</sup> As will be discussed later, Complainants proffer no expert testimony to support any of their assertions of harm or entitlement to reparations. Instead, they rely on summaries from their counsel’s legal assistant, incorrect mathematical calculations and numerous assertions of unsupported “reasonable” assumptions as to what nonexistent data could be presumed to be in to support their claims. . As noted by Respondents' expert witness, Jeffrey Compton, Complainants' reparation calculations are wholly unreliable. Affidavit of Jeffrey Compton Paragraph 26 (Resp. App Tab 103 p. 2762).

Also, Complainants fail to address the one benefit that this \$8 rate gave them that other ground transportation company had – the right to have unlimited trips into the cruise terminal for a flat fee. Complainants could transport as few passengers as they chose. They did not have to make their customers wait for a sufficient number of persons to accumulate before moving passengers. Hotels and motels did not have that privilege.

### **3. Hotels are not “Off-Port Users” Under the Tariff**

Complainants spend a significant portion of their brief arguing that because local hotels and motels have parking lots and bring passengers to the Cruise Terminal they should have been charged the same \$8 per space rate as Complainants. Complainants use this straw man argument to try to bolster a preferential treatment claim. This of course ignores the reason Tariff Circular No. 6, Item 111 was amended – to provide Complainants with a special flat rate which they requested. It was clear from the history of this provision that the rate would only apply to them. (Resp. App. . at Tab 25 p. 1517; Minutes of Board Meeting of August 28, 2006, BOT000514). Complainants try to bolster this argument from deposition testimony of Port Director Michael Mierzwa who was asked, over objection to counsel, to interpret the language of that tariff. He testified in his deposition that at the time enacted the term “Off Port Parking User” was only relating to the three Complainants. (Resp. App. Tab 78 at p. 2238-2239–39, Mierzwa Deposition at pages 173-474). This was, of course, because the three Complainants specifically requested to be charged a flat rate instead of a per trip access fee. Cindy Hayes letter dated June, 14, 2005, BOT\_010819 (Resp. App. Tab 51 at p.1765-66); Cindy Hayes letter dated October 15, 2005, BOT\_010815 (Resp. App. Tab 55 at p.1773); Michael Mierzwa letter date July 20, 2006, BOT\_010816-010818 (Resp. App. Tab 54 at p.1774-1778); Deposition of of George Templeton at 40:12-40:25 (Resp. App. Tab 83 at p. 2351); “Shuttle Diplomacy” Article in July 31, 2006,

edition of The Daily News, EZC\_A\_001811-001813 (Resp. App. Tab 47 p. 1751-1753); Deposition of Of Sylvia Robledo at 63:2-63:4 (Resp. App. Tab 80 at p. 2321). George Templeton, owner of Complainant Lighthouse admitted that it would be impossible to impose a per space fee on hotels. (Resp. App. Tab 83 p. 2528-2529–29, Deposition of George Templeton at pages 42-3–43):

How can they charge them \$8?·They don't know how many spots they're using.·We don't know.·How would I know?·It's not my business.·I don't know.

*Id.* The \$8 per space per month rate was distinctly “a deal we [Complainants] accepted with the port.” (*Id.* at 43). The hotels did not request nor secure such a deal. It is completely disingenuous and duplicitous to now argue that every parking lot in the City of Galveston should have been accessed an \$8 per space fee on the premise that someone using that lot may have been a cruise passenger. The Tariff was written to accommodate the Complainants at their specific request.

#### **4. Differences in Operations and Transportation Factors Justify the Exemption of Taxicabs**

Complainants also argue that the fact that taxicab companies are not charged the same access fees is proof of discriminatory treatment. As noted above, taxicabs are not similarly situated or in a competitive relationship to Complainants. Further, they are exclusively regulated by the City of Galveston. The Wharves does not have the power to allow taxicabs to increase their rates; it could only ask the City Council to modify its Ordinances governing taxicab rates and charges, in order to do so. Affidavit of Michael Mierzwa at ¶ 48 (Resp. App. Tab No. 75). In any event, charging taxicabs a \$10 or \$20 per trip Access Fee would have a detrimental impact on the operations of the Cruise Terminal.

Mike Mierzwa explained the problem to the Wharves’ Board in 2006:

There were a couple of problems associated with the three ship cruise day, one being the problem with taxis. Mr. Mierzwa understood that it was difficult to get more taxis here because the taxi drivers cannot make enough money during the

week. . . . Taxis will continue to be a problem and we may have to look at another way to handle this problem. We will be criticized for the difficulty in getting taxis cycled back in to pick up the passengers. In order to become a first class cruise port we must find a way to get a handle on this.

.....

When you are looking at the cruise ships you are looking at a facility that is a single purpose facility that you only use half of the time. The other half of the time it sits idle. That is the same way with taxi cabs. You need 100 cabs on cruise days and 5 the rest of the week. Taxi drivers cannot make a living and pay for their cab on 3 days a week.

(Res. App. at Tab 58 at p. 1732-1732-32; Minutes of February 27, 2006 Board Meeting; BOT 000402-3). As the affidavit of the owner of Tropical Taxi indicates, paying a fee that could not be passed on to customers would cause the taxicab owners to lose money per trip. Mr. Mierzwa noted that even with no fee it was very difficult to get sufficient numbers of taxicabs to move passengers. If taxicabs would lose even more money going to the terminal, they would simply choose not to do it by any means available. This would mean that for every cruise day the Wharves would be faced with moving a significant number of passengers efficiently out of the terminal with no means to do so. This would leave all of these passengers having to take their luggage out of the terminal, cross Harborside Drive and walk toward downtown Galveston, hoping to find a means of transport somewhere. As Mr. Mierzwa noted, this would take away from the Wharves attempting to develop a “first class cruise port.”). Where a port has a justifiable business reason to grant a preference to one entity over another, there is no Shipping Act violation. *Initial Decision, Nos. 08-03 and 07-01, Maher Terminals LLC v. The Port Authority of New York and New Jersey*, Served April 25, 2014 at pp. 48, 53 (Port's fear of losing significant business customer justified giving that customer more favorable lease terms). These factors, along with the fact that Complainants



are not similarly situated with taxicabs justify the exemption of taxicabs from Paying Access Fees.

## **5. Complainants Offer No Evidence that Any Hotel/Taxi Partnerships Exist**

Complainants vaguely assert that a number of hotels are partnering with taxicab companies to circumvent paying Access Fees. They imply some sort of financial arrangement between these two groups. Complainants offer no proof of this assertion, because there is none. They provide no data and no information by which any such activity can be quantified; only innuendo and guessing. Even the Galveston.com advertisement they use as “proof” fails to mention a single hotel offering a customer taxi service.

Complainants also ignore the fact that under the Galveston City Code it would be illegal for a hotel to enter into a financial arrangement with a taxicab company. (Resp. App. Tab 40 p. 1706,); GALVESTON CITY CODE Sec.§ 35-78).. Further, the City of Galveston controls the placement of taxi cab stands. (Id. at GALVESTON CITY CODE § 35-77)..

The sole person testifying to witnessing any interaction between a hotel and taxicab was Sylvia Robledo. In her deposition she testified that she once witnessed a hotel clerk at the Gaidos’ Hotel, which does not provide shuttles for lodgers, call a taxicab for a customer. (Deposition of Sylvia Robledo 185-186, Resp. App. Tab 80 at pgs. 2343-44). She then claimed that some hotels do not transport cruise passengers lodging at their hotels to the terminal but instead require the customers to find their own transportation including taxicabs. (Id. at pages 186-187, Resp. App. Tab 80 at pgs. 2344-45).87). Some hotels she said require the lodger to call the cab on their own (Id.). She admitted the following:

Q. So it’s no different than if the customer goes and says to the hotel, “We don’t have any way of getting there,” and the customer calls for a cab?

A. Right.

(Id. at page 186). This is not a plot to circumvent access fees or a partnership with taxicab companies. The Port has no power to control taxicabs or to set their rates. If the hotel does not hire and pay for a vehicle to enter the Cruise Terminal the hotel is not “accessing” the terminal and there is no Access Fee. This is no different from someone wanting to take a cruise calling for a taxicab from home or an airport. Complainants also fail to show how a hotel telling its lodgers they are on their own for transport gives these hotels an unfair advantage over them - especially when Complainants had the right to access the terminal on an unlimited basis.<sup>11</sup>

What Complainants suggest is that somehow the Port should have placed a fee on businesses in the City of Galveston and beyond who do not actually access the terminal but who may do business with a cruise passenger. This is a tax. The Port has no power to tax. This argument lacks both evidentiary support and legal merit.

## **V. COMPLAINANTS ARE NOT ENTITLED TO REPARATIONS**

Complainants assert that they are entitled to financial reparations resulting from their treatment by the Wharves. As a matter of law, they are not.

### **1. Complainants Reparations Claims are Barred by Three Year Statute of Limitations:**

Claims for reparations under the Shipping Act of 1984 are subject to a three year statute of limitations from the time the alleged cause of action accrued.<sup>12</sup> *Western Overseas Trade and Development Corp. v. ANERA*, 26 S.R.R. 875, 885 n. 17 (FMC 1993); *Maher v. 17* (FMC 1993); *Maher v. Port Authority of NY and NJ*, 32 S.R.R. 1185 (FMC 2013). (Docket No. 08-03, January

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<sup>11</sup> Complainants proffer a number of hypothetical “cheaters” regarding access to the cruise terminal. The Port has no ability to follow each shuttle on every trip to make sure they did not pick up a customer from another business. Complainants’ record shows that when they disagreed with a Port practice, they did not hesitate to complain and express that complaint both in writing and at Wharves’ Board meetings. The absence of this record, when they bear the burden of proof, shows no substance to these arguments

<sup>12</sup> The Act provides that “[a] person may file with the Federal Maritime Commission a sworn complaint alleging a violation of this part, except section 41307(b)(1). If the complaint is filed within 3 years after the claim accrues, the complainant may seek reparations for an injury to the complainant caused by the violation.” 46 U.S.C. § 41301(a). See also 46 CFR 502.63

31, 2013)) (A party moving for summary judgment on an affirmative defense must establish all of the essential elements of the defense to warrant judgment in its favor. FED. R. CIV. P. 8(c)(1)); FED. R. CIV. P. 54.. The essential element of the statute of limitations defense for reparations claims under the Act is that the cause of action accrued more than three years prior to the filing of the complaint. *See* 46 U.S.C. § 41301(a).). If the Respondent meets its burden to show that the statute of limitations has run, then plaintiff/complainant must establish an exception to the statute of limitations in order to avoid summary judgment. *Campbell* at 775. *See Zenith Radio Corp. v. Hazeltine Research Inc.*, 401 U.S. 321, 338 (1971). Absent an exception, a claim accrues (and the statute of limitations begins to run) “when a defendant commits an act that injures a plaintiff’s business.” *Zenith Radio Corp. v. Hazeltine Research Inc.*, 401 U.S. 321, 338 (1971). *Id.* Complainants allege that they have been treated in an unfair prejudicial and discriminatory manner from hotel operators and taxi cab operators since the August 2006 \$8 Per Space Tariff was adopted.

In *Maher*, In *Maher*, the Commission held that claim accrual occurs when a knew, or should have known, that it had a cause of action, that is, when it knew, or should have known, whether the four Ceres factors existed. The Commission in *Maher* focused on when the Complainant knew that its treatment was different from the treatment of others similarly situated. That is when did the Complainant know that it would be charged on a different basis than the hotels or taxis? Even if the Commission were to assume that the Complainants, hotels and taxis were similarly situated, the August 2006 Tariff clearly stated they were being treated differently - at Complainants' request. When the Tariff was amended in 2007 to provide different per-trip charges for different sizes of shuttles and buses in 2007, the Complainants' rates did not go up. That is, they were not paying any more than they had already. If Complainants wanted to

ascertain whether the Wharves was properly charging Access fees based on shuttle bus size, they had the means to do so – the shuttles were out in the open and the Port’s records were subject to review under state law. Likewise, the Tariff clearly stated that taxis were not subject to an access fee. The Complainants knew or should have known both in August of 2006 and a year later in 2007 that the fee charged them by the Port to access the cruise terminal was different from taxis and was different from those paying "per trip" access fees. Likewise, Complainants could have easily ascertained any facts regarding whether the transportation factors pertaining to them, hotels and taxis justified this different treatment.

## **2. Complainants’ Reparations Claims Fail to Meet the Reasonable Certainty Threshold**

### **a. Complainants Incorrectly Argue that “Reasonable Estimations” is their Standard of Proof**

46 U.S.C. §41305 of the Shipping Act allows the Commission to award of reparations for violations of the Act upon a showing of “actual injury”. In interpreting the standard of proof to show “actual injury” under the Shipping Act the Commission has followed the mainstream of the law on damages, as followed by the courts. *CaliforniaCal. Shipping Line, Inc. v. Yangming Marine Transport Corp.*, 25 S.R.R. 1213 (Oct. 19, 1990).). While the fact of injury must be shown with reasonable certainty, the amount can be based on something less than precision but something based on a reasonable approximation *supported by evidence* and by reasonable inferences. Additionally damages must be foreseeable or proximate or, in contract law, within the contemplation of the parties at the time they entered into the contract. Speculative damages are not allowed. Finally, regarding claims for lost profits, there must be reasonable certainty so that the court can be satisfied that the wrongful act caused the loss of profits. *Id.*; *Tractors and Farm Equipment Ltd. v. Cosmos Shipping Co., Inc.*, 26 S.R.R. 788, 798-799 (ALJ 1992).).

Instead of adhering to this standard Complainants suggest that under *Adair v. Penn-Nordic Lines, Inc.*, 1991 WL 383091, \*23 (FMC 1991), the ALJ can rely solely on “reasonable estimations” to determine this injury. They use this small excerpt to essentially suggest that any amount they can guess at, no matter the lack of data, they can use by declaring it to be a “reasonable estimation.” However, Complainants purposely misquote the rule in *Adair* by providing only a small snippet of the discussion on damages in that opinion. The actual discussion states a much less sweeping standard than they suggest:

The Commission's predecessors under the 1916 Act have issued numerous decisions which describe the applicable standards for proof of injuries which are compensable under the 1916 Act and, by force of precedent or analogy, under the 1984 Act. The basic principles are those similar to the law of damages as developed in the courts. Thus, ***proof of injury or damages must rest on reliable evidence*** that shows that the violation of law was the proximate cause of the damages. In some instances, when precise evidence measuring financial injury is unavailable because of the nature of the violation, the Commission will rely on reasonable estimations, as do the courts, so that the wrongdoer does not benefit from its misconduct. ***Alleged damages based on unreliable or speculative evidence are not allowed. The complainant is required to show the fact of injury with reasonable certainty.*** The Commission has recently restated these principles as they apply to section 11(g) of the 1984 Act in *California Shipping Line, Inc. v. Yangming Marine Transport Corp.*, cited above, 25 SRR at 1230. Among the many cases discussing these basic principles of the law of damages, as they have been applied for many years by the Commission in complaint cases, are: *Prudential Lines, Inc. v. Farrell Lines, Inc.*, 22 SRR 1054, 1058 (1984); *Prudential Lines, Inc. v. Farrell Lines, Inc.*, 22 SRR 826, 847 (I.D., F.M.C. notice of finality, June 7, 1984); *Ballmill Lumber & Sales Corp. v. The Port of New York Authority et al.*, 11 F.M.C. 494, 510-511 (1969).

*Adair v. Penn-Nordic Lines, Inc.*, 1991 WL 383091, \*23 (FMC 1991)) (emphasis added). The “reasonable certainty” standard for proving actual injury controls here not one based on “reasonable estimations.”

#### **b. Complainants Cannot Demonstrate Actual Injury with Reasonable Certainty**

Prior to the filing of their Brief on May 1, 2015 Complainants never disclosed their theory supporting reparations, or proffered any details on the amounts they were claiming as injury and

how those amounts were determined. Complainants' Proposed Findings of Fact fail to reference any findings regarding or evidence of damage claims. Their theories and evidence are fashioned through shallow legal argument and nothing more.

Without the use of expert testimony, affidavits or deposition testimony, Complainants have crafted a damage model based on no data, incorrectly or “cherry picked” facts and false assumptions. (Affidavit of Jeffrey Compton Paragraph 25, Resp. App. Tab 103, p. 2762). Complainants actually admit that they lack any real data to support their damage model (Complainants’ Brief at 28). Instead they ask the Commission to accept a leap of faith based on “reasonable assumptions.” However, as noted above in order to meet their burden of proof on actual injury and reparations, they needed to present evidence so that the alleged reparations could be calculated with reasonable certainty. They failed to meet this burden.

Respondents have engaged an expert and timely disclosed that expert, Jeffrey Compton, CPA, a qualified economic expert regarding damage claims. After review of this new theory appearing for the first time in Complainants' May 1, 2015 Brief, Mr. Compton formed the following opinions:

- a. Complainants have failed to substantiate on any reliable basis that they were financially harmed by being assessed a monthly fixed rate \$8 per parking space.
- b. Complainants’ methodology is fundamentally flawed because it extrapolates six months of 2006 data while ignoring other months of available data and miscalculates the alleged percentages of revenue based upon that data.
- c. Complainants were i) consistently charged the applicable 2006 Tariff rate for Off-Port Parking Users and ii) based on available data, appear to have benefited from this fixed rate structure, which had been requested by the Complainants.

- d. Any failure of the Port of Galveston to historically assess additional Access Fees on other users (either due to a failure to invoice or collect additional amounts) did not result in the Complainants paying any more than the amounts they were obligated to pay under the Tariff established during 2006 and maintained through September 2014.

(Affidavit of Compton Paragraph 5, Resp. App. Tab 103, p.2757).

Complainants admit that “Respondents did not track” any of Complainants' access trips to the Cruise Terminal from August 2006 through May 2014. (Complainants' Brief at 28-29, 37, 41). Of course, the reason is that Complainants were granted unlimited access to the terminal as an additional benefit for the \$8 flat rate; there was no need for either Complainants or the Wharves to track them. Complainants then presume that despite this unlimited access, they would have accessed the terminal no more than they did in the first half of 2006 in all subsequent years. Complainants' Brief at pp. 29-35. They then assume that a reduction or increase in parking spaces would lead to a proportionate increase/decrease in trips to the Cruise Terminal, again without any supporting evidence. These assumptions have no basis in fact. Mr. Compton testified that:

There is no data presented or referred to in Complainants Brief to support their assumptions of theoretical shuttle activity between 2008 and 2014. Their model relies upon the unsupported assumption that the distribution of trip traffic during the first 6 months of 2006 remained the same in all future periods, again adjusted for alleged decreases in capacity.

....

The available evidence contradicts the assumption that the distribution of trip traffic remains constant same over time. As such, Complainants methodology is based on an erroneous assumption.

(Affidavit of Jeff Compton Paragraphs 30, 31, Resp. App. Tab 103, p.2764).

The fact is that the opposite presumption could just as easily be drawn and guessed: Because they had unlimited access, they would have run as many trips as they could to try to speed service. With no extra cost, why make someone sit in the van and wait to try to fill it up, while they are staring at their cruise ship in the distance? Wouldn't taking them make them happier, and more likely to use that same lot on future cruises? It is just as reasonable to presume that with free reign to access the terminal they would have strived to make as many trips as possible to move passengers more quickly, in hopes of referrals, recommendations and repeat customers. In the end, Complainants provide no evidence that the number of parking spaces had a straight line impact on the number of trips they would have taken in those years. The testimony of EZ Cruise employee Jason Hayes, the son of EZ Cruise co-owner Cynthia Tompkins, flatly contradicts these assumptions. He estimated that during the 2007 through 2014 time period his company ran an average of 600 trips per week. (Resp. App. Tab 81, p. 2646-48, Deposition of Jason Hayes Pages 158:1 through 160:23). On an annual basis this would have been 31,200 trips a year for EZ Cruise alone (600 times 52 weeks). In the first half of 2006, even including trips by vehicles EZ Cruise retained from Galveston Limousine Service, at the original \$10 per trip rate, EZ Cruise ran a total of 2,966 trips (RPFF 72, 73) which would annualize at 5.932 for that year had they maintained that rate. But as Mr. Hayes revealed they increased their access rate approximately six fold. Thus, the available facts do not support the Complainants' estimates. There is no evidence to support Complainants' allegations that (1) they made the same number of trips per month to the Cruise Terminal between August 2006 and October 2014 as they did in the first six months of 2006, but for changes in lot size, and (2) if there lots sizes changed there would be pro-rata increases or reductions in trips to the Cruise Terminal consistent with those



made in the first six months of 2006. This position also ignores the rationale presented by the Complainants when attempting to get a flat rate fee:

The flat fee is much easier for a startup company, such as ours to budget and reflect expenses for reports at our monthly shareholder meetings.

(Resp. App. Tab 53 at p. 1773 October 15, 2005, Letter from Tompkins to Port Director Steve Cernak BOT\_ 010815). The record also shows that any time the Complainants could show that the usable capacity of their lots decreased the fee charged by the Port also decreased. Deposition of Sylvia Robledo at 67:6 – 68:3 (Resp. App. Tab 80 p.2324); Affidavit of Michael Mierzwa Paragraph 24, (Resp. App. Tab 75); Deposition of Sylvia Robledo Page 67:4-23 (Resp. App. Tab 80 at p. 2324).

Further, Complainants declare a number of inaccurate or simply false statements of fact and then attempt to build on these inaccuracies to support their “reasonable estimations.” The inaccuracies underpinning their damage model includes the following;

- 1. While evidence of this disparate treatment is found in each and every month that the Tariff has been enforced against Complainants by way of per-space per-month Access Fees, the starkest examples of same are found in Respondents’ Access Fee invoices for the months of (May 2008, June 2008, September 2008, November 2008, and February 2009.” (Complainants’ Brief at 22) – This is simply incorrect. (Compton Affidavit Paragraph 35, Resp. App. Tab 103, p. 2765; Historical Trial Balance, BOT\_006375 Resp. App. Tab 67 p. 1929).**
- 2. According to all invoices produced by Respondents, between January 1, 2008 and December 31, 2013, not a single limousine service was charged an Access Fee for use of the Cruise Terminal.” (Complainants’ Brief at 23) –This is incorrect. Between 01/01/2008 & 12/31/2013 the following limousine services accessed the Cruise Terminal: Galveston Limousine, Sam's Limousine and Royal Carriages ALL were charged access fees. *See supra*.**
- 3. The Access Fees charged from December 17, 2007 through June 30, 2014 were established based on average trip counts for individual Cruise Terminal users found in a study conducted by Respondents in 2006.” (Complainants’ Brief at 27) – This is false. The “study” referenced by Complainants was actually a series of trip counts made by port staff for 2005 and 2006 to assess trip charges against the various entities accessing the port. (Resp. App. Tab 58 p. 1790) The deposition**

reference to Mr. Mierzwa makes clear that “we were actually keeping track of the access by the individual private parking lots back at that time and those numbers -- that's what those numbers reflect.” (Resp. App. Tab 75 p. 2240 Michael Mierzwa Deposition 175:8-12). This “study” was not an allocation formula. It was nothing more than a trip tally. (Resp. App. Tab. 59 p. 1791) BOT\_ 010841, BOT\_ 010844, BOT\_ 010846, BOT\_ 010851). Then, in his deposition Mr. Mierzwa also discussed a 2014 study which compared parking lot numbers by entity as they related to all available parking lots. This study was not used to formulate Access Fees. The 2014 study cannot be used as a basis for factual assumptions of events from August of 2006 to June of 2014. Wharves' senior management members flatly deny any such formula was ever used. (Michael Mierzwa Affidavit Paragraphs 14, 31, Resp. App. Tab 75; Mark Murchison Affidavit Paragraph 14, Resp. App. Tab 77).

Further, the fees charged from January 1, 2005 through the summer of 2014 were not based on any type of allocation formula. (*Id.*). In 2003, the Board of Trustees set the tariff to provide for a \$10 per trip charge. (Resp. App. Tab 1 p. 17). In 2006, after Complainants refused to pay that fee for the charges shown on the 2006 “study” they negotiated with the staff of the Port for a flat fee. Beginning August 15, 2006, the fee applicable only to the Complainants and other parking lots<sup>13</sup> was the \$8 per space per month fee. In June of 2014, when the basic \$10 per trip rate was increased, it was based on indexing the \$10 fee with the Consumer Price Index. (Resp. App. Tab 79 p. 2285-2287), Murchison Deposition Pages 130:13-15, 131:1-12, 132:3-24). This “formula” upon which all of Complainants “reasonable estimations” are based was never actually used as a basis for any tariff put into effect and charged to Complainants.

4. **Collectively, for purposes of the Tariff in effect from December 17, 2007 through June 30, 2014, Complainants should be responsible for 29.6% of chargeable accesses to the Cruise Terminal.” (Complainant Brief at 27).** – Again this falsely assumes that the 2006 trip counts can be applied to subsequent years and that fees charged in prior years were based on that same ratio. Affidavit of Jeffrey Compton Paragraph (Resp. App. Tab 103, p. 002762-002763). Further, this is based on an inaccurate trip count in 2006. Complaints’ calculations omitted the fact that EZ Cruise hired Galveston Limousine, which significantly increased their actual trip count. *Id.* With these additional trips added in, EZ Cruise alone logged 25.3% of all trips. *Id.* Further, their trip count also completely ignored the trip data for 2005 without explanation. *Id.*
5. **“[A]ll Cruise Terminal users were charged based on the 2006 study, unadjusted for changes in traffic or users.” (Complainant Brief at 27)** – As noted above, the 2006 charges were not based on this “study.” This “study” was simply the trip counts supporting Access Fee invoices at \$10 per trip. (Affidavit of Mierzwa Paragraph 14 Resp. App. Tab 75; Affidavit of Murchison Paragraph 16, Resp. App. Tab 77).

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<sup>13</sup> Not all Off-Port Parking Users as defined in the tariff have joined this action. The \$8 per space per month fee applied to all such users equally. Resp. App. Tab 2 p. 80-81.

6. **Accordingly, the only records reflecting Complainants proportional use of the Cruise Terminal are from the year 2006. (Complainant Brief at 28)** – This is not correct and also assumes that a “proportional use” formula was ever used by the Port. It was not. (Mierzwa Affidavit Paragraph 2, 14, 31; Resp. App. Tab 75; Murchison Affidavit Paragraph 14, Resp. App. Tab 77). The 2006 records are simply trip counts.<sup>14</sup> As Mr. Hayes of EZ Cruise testified, that lot’s access increased from approximately 5,000 trips a year to an annualized 31,200 trips per year. (Resp. App. Tab No. 81 p. 2446-2448, Deposition of Jason Hayes Pages 158:1 through 160:23). Further, the lack of Complainant trip data after June of 2006, when they were given unlimited access for a flat fee, does not support the presumption that subsequent use would be constant. (Affidavit of Compton Paragraphs 30, 31 Resp. App. Tab 103, pgs. 2763).
7. **The Wharves Board’s Tariff charged Cruise Terminal users Access Fees per Access/Trip, and so users were charged based on the proportional volume of traffic that each such entity brought into the Cruise Terminal (Complainant Brief at 28)** – As noted previously, the Wharves Board never used a “proportional use” formula for the tariff. (Mierzwa Affidavit Paragraph 2, 14, 31 Resp. App. Tab 75; Murchison Affidavit Paragraph 14, Resp. App. Tab 77).
8. **In total, as a result of Respondents’ violations of the Shipping Act, EZ Cruise was overcharged, and so overpaid in the amount of \$112,614.15, for which EZ Cruise seeks reparations. (Complainant Brief at 34)** – First, all of the calculations used by Complainants are based on incorrect numbers because they fail to add the trips resulting from EZ Cruise hiring Galveston Limousine in 2005 and 2006. Cynthia Tompkins admitted that her company did this and provided a tally of trips Galveston Limousine made to the Cruise Terminal transporting EZ Cruise customers, at EZ Cruise’ expense, to the Wharves staff: 4146 trips in 2005 and 1297 trips in first three months of 2006. (Resp. App. Tab No. 51, p. 1765, June 14, 2006<sup>15</sup> Letter from Tompkins to Mierzwa with attached chart BOT\_010819-20). Further, the analysis of Mr. Compton, a CPA and economic damage expert, completely refutes this reparations claim. First, even using the Complainants own formula they significantly overstated this alleged overpayment due to data errors. (Affidavit of Jeffrey Compton Paragraphs 33-35, Resp. Tab 103, pgs. 2763-66). Further, based on the reduction in fees charged by a flat rate rather than the \$10 per trip rate, Complainants realized a huge savings. *Id.* If Complainants actually increased their access to service their customers better (Deposition of Jason Hayes Pages 158:1 through 160:23) then this savings would be even greater.

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<sup>14</sup> Complainants appear to fault Respondents for not keeping trip count data post-August 2006; however, they have the burden of proof and produced no evidence of their own trip counts.

<sup>15</sup> The letter is dated June of 2005, but Ms. Tompkins admitted this was a typographical error and the letter was sent in 2006. Deposition of Cynthia Tompkins deposition Page 39:20-39:22 Resp. App. Tab 82 at p. 2521).

These inaccuracies are yet another example of the reliability problems with Complainants' reparations model. Each level of their straw house is predicated on unsupported estimates that are even contradicted by their own admissions. Their alleged “overpayments” are not proven with any reasonable certainty. In fact, the available evidence reflects that they significantly benefited from this flat rate as they presumed they would when first demanding it in 2005 and 2006.

**b. The Available Evidence Shows That Complaints Actually Benefitted from the Flat Rate Fee**

The data that is available relates to Complainants access from January 1, 2005 through June 2006 and then, once the flat rate was eliminated, usage after October 1, 2014. Unlike Complainants, Respondents do not rely on guesses and a calculator to review this evidence. Respondents engaged Jeffery Compton, CPA, with extensive experience in determining economic losses by claimants to review the available evidence.

Mr. Compton analyzed available data of Complainants trips n 2005 and 2006, then in October and November of 2014 after the flat rate was eliminated. He determined that each of the Complainants realized immediate savings as follows:

Complainant	Period	A	B	A - B	Reference
		Access Fee at \$10/Trip	Access Fee at \$8/Parking Space	Complainant Savings Under Fixed Rate of \$8/Parking Space	
EZ Cruise	January 2005 - June 2006	\$ 87,930	\$ 35,680	\$ 52,250	Exhibit A1
Lighthouse	January 2006 - June 2006	\$ 14,230	\$ 9,120	\$ 5,110	Exhibit A2
81st Dolphin	July 2005 - June 2006	\$ 25,430	\$ 11,520	\$ 13,910	Exhibit A3

(Affidavit of Compton Paragraphs 40, and Exhibits C1, C2 and C3 to same, Resp. Tab 103 pgs. 2773-75).

The benefit was so great that Mr. Compton determined that:

This analysis suggests that Complainants' activity levels could have decreased significantly while still benefitting from the fixed rate of \$8 per parking space. For example, the activity level of EZ Cruise could have dropped by up to 59.4% (i.e. \$52,250 / \$87,930) before the access fee of \$10 per trip structure would have been more beneficial than a fixed rate of \$8 per parking space. I note that between 2006 and 2008 (i.e. the year with the lowest number of cruise passengers), total cruise passengers only decreased by 38.9% (i.e. change from 2006 count of 616,939 to 2008 count of 376,815).<sup>16</sup>

(Affidavit of Jeffrey Compton Paragraph 41, Resp. App. Tab 103 p. 2767). That is, Complainants could have limited their trips significantly and still saved money over the \$10 per trip rate.

No other user received this retroactive reduction in fees. No other class of users received unlimited access to the Terminal for a flat fee. The financial data supplied by the testimony of Mr. Hayes who admitted that EZ cruise actually may have increased its usage six fold under the flat rate tariff. (Resp. App. Tab 81 p. 2446-2448; Deposition of Jason Hayes Pages 158:1 through 160:23).

As a matter of law, Complainants cannot establish reparations with a reasonable certainty. In fact the data reflects that Complainants were not actually injured or prejudiced by the \$8 flat per space per month rate. They paid less and received unlimited access to the Terminal.

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<sup>16</sup> After this date, due to larger cruise ships, the passenger count increased until in 2014 over 641,650 passengers boarded the ships calling on Galveston. (Resp. App. Tab 77 p. 2174, 2014 CAFR at page 54). Taking from Complainants' brief, it would be a "reasonable assumption" that the 600 trips per week admitted to by Jason Hayes is accurate.

## **VI. COMPLAINANTS DID NOT SUBSIDIZE BENEFITS RECEIVED BY OTHER USERS**

Once again Complainants, without assistance of any expert, attempt to build a straw house to claim that they are due additional reparations. First, Complainants focus on the May 2014 study which compared the number of spaces used by Complainants with other lots and the Port's Lots A and B. They extrapolate from this study a theory that the Board used a "proportional use" formula to charge access fees from 2006 through 2014. Complainants then assume the following, without evidence:

- that a number of hotels ran shuttles rated for passenger capacity which should have resulted in a higher charge; and
- that no limousines were charged in this time period.

They finally add in taxicabs, who for regulatory and transportation factors are exempt from a fee. Taking all these assumptions, they then go back to the proportional use formula, assume a reduction for hotels and limousines and buses even though they have no supporting evidence. Counsel then opines that if the Port did not collect 100% of what Complainants argue was due from 100% of the potential users of the terminal, Complainants effectively "subsidized" the others' use.

This maze of unsupported assumptions cannot be the basis for establishing actual injury and a reparation amount with reasonable certainty. First, the Board never used the "proportional use" theory as opined and described by Complainants. Second, the Complainants themselves admitted that the capacity rating of a vehicle has no actual bearing on the number of passengers it will actually hold because of luggage. Jason Hayes of EZ Cruise admitted the same problem when explaining why EZ Cruise vans, rated at 15 person capacity could not really hold 15 people:

You have to take a backseat out of them. So, you go from making a 15-passenger to making it 9 plus one, which makes it 10-passenger. That's the problem with using vans.

(Resp. App. Tab 81 p. 2413 Deposition of Jason Hayes Page 37:1-17). Mrs. Sylvia Robledo of 81<sup>st</sup> Dolphin stated that to accommodate luggage she could only get 7 persons in her vans. (Resp. App. Tab 80 p. 2509, Robledo Deposition at 42:5-10). Accordingly, making a global assertion that hotels or other companies should have paid more based exclusively on capacity rating is incorrect.

Complainants suggest that the ALJ can presume that each hotel who had obtained a decal with the Wharves would have used each type of van on a proportional basis and that a deficiency calculation can be made from this assumption. There is absolutely no data to support such a assumption. There is no data to make such an assumption. Why would a hotel use a bigger van, if only a couple of guests needed transportation to the Cruise Terminal?

The Complainants point out that an employee of the Port responsible for tracking the different size vehicles did not do her job properly and report information on shuttle bus or van passenger size to the Wharves' financial office. (Affidavit of Murchison Paragraph 23, Resp. App. Tab 77, p.2086). This deficiency was noted in the staff's work in 2014 and a new individual was hired to do this work. *Id.* This is why the billing now reflects the larger vehicles. *Id.* However, this was no policy; it was an inadvertent error which was later corrected.

The end result of this error is not that Complainants subsidized the other users. They paid the flat rate they demanded in 2006 and used it to the fullest. (E.g., EZ Cruise increasing access six fold). They were not required to pay anything more because of underpayments by others. At the end of the day, to the extent the Wharves failed to collect Access Fees from anyone obligated

to pay them, the Wharves ended up having to come up with funds need to pay for the costs of the Cruise Terminal. As noted by Jeffrey Compton, CPA, Respondents' expert:

Complainants' subsidy argument is flawed because it lacks connection to the facts. There would not have been a reduction in tariffs to the extent others paid more. Rather it would have helped the port collect more money.

(Compton Affidavit Paragraph 44, Resp. App. Tab 103 p.2767-68). Mr. Compton also noted that Complainants calculations were seriously incorrect:

I have been unable to replicate certain of the figures presented by Complainants under their subsidy argument. In certain instances, Complainants' mathematical computations are incorrect. For example, in their calculation resulting in \$157,970 of uncollected fees from Moody Gardens, Inc., Complainants failed to deduct the \$10 per trip actually charged; their calculation is therefore overstated as it is based on fees of \$50 per trip and \$20 per trip, rather than \$40 per trip (*i.e.* \$50 less \$10) or \$10 per trip (*i.e.* \$20 less \$10).

*Id.* at Paragraph 45. Mr. Compton also noted that Complainants made a number of mathematical errors and improper assumptions which resulted in overstating their calculations. *Id.* at Paragraphs 45 and 46 Compton concluded that not only were Complainants data and calculations incorrect, making their methodology improper, the overall assumption of a "subsidy" by the failure to collect some fees from other users is fatally flawed:

Any failure of the Port of Galveston to historically assess additional Access Fees on other users (either due to a failure to invoice or collect additional amounts) did not result in the Complainants paying any more than the amounts they were obligated to pay under the Tariff established during 2006 and maintained through September 2014.

*Id.* at Paragraph 47. Their subsidy claim, like their "excess payment" claim, is based on an unreliable methodology. It cannot be proven with reasonable certainty and is based on completely false assumptions.

## **VII. COMPLAINANTS CEASE AND DESIST RELIEF IS IMPROPER**

Complainants request injunctive relief as their final claim. They assert the following:



Accordingly, the prejudice and disadvantage caused by the Wharves Board's actions in exempting taxicabs from paying Access Fees is the proximate cause of Complainants' injuries. Complainants ask that the Wharves Board be caused to cease and desist enforcement of the Tariff until it is amended to conform to Section 41106(2) of the Shipping Act of 1984..

(Complainants' Brief at 45). Essentially, they are asking for the unprecedented relief of free access to the cruise terminal until taxicabs are charged a \$20 per trip fee.

As noted above, taxicabs are unique and not similarly situated with Complainants in a number of ways:

1. Taxicabs do not own and operate parking lots for cruise passengers Affidavit of Margaret Brenham, owner of Tropical Taxis Resp. App. Tab 89 p. 2652. ;
2. Taxicabs do not devote 100% of their business to providing such parking lots and transportation to the cruise terminal for passengers. *Id.*
3. Taxicabs are regulated by the City of Galveston. The Port cannot require them to increase fees and taxicabs cannot increase fees without permission from the City of Galveston (Mierzwa Affidavit Paragraphs 36-48 Resp. App. Tab 75 p. 2076-78); Simons Affidavit Paragraphs 6-10 Resp. App. Tab 76 p. 2079-80). Chapter 35 of the Galveston City Code Resp. App. Tab 40 p. 1706-1708; Affidavit of Margaret Brenham Resp. App. Tab 89).
4. Imposing a \$20 fee on taxicabs would require them to operate at a loss when entering the Cruise Terminal; *Id.*
5. The likely result of imposing such a fee is that taxicabs will cease to service the Cruise Terminal in that capacity (Mierzwa Affidavit Paragraphs 36-48 Resp. App. Tab 75 p.2076-78; Simons Affidavit Paragraphs 6-10 Resp. App. Tab 76 p.2079-80);
6. The Port already has too few taxicabs servicing the terminal to handle those passengers who did not park at Complainants' lots or at some other lot or a hotel. *Id.*
7. If taxicabs cease to service the Cruise Terminal this will create a serious traffic problem. Those passengers needing taxicabs cannot use Complainants, hotel shuttles, limousines or buses. They will be required to gather their luggage and cross Harborside Drive, disrupting traffic and hindering the ability of the Wharves to service the cruise ships at the terminal properly. *Id.*

The ultimate effect of this requested relief would require the Wharves to make the following choice to either 1) charge no fees to anyone so that transportation needs of the terminal can be

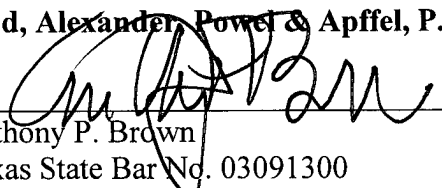
met and thus lose hundreds of thousands of dollars needed by the Wharves to operate, or 2) demand a fee on taxicabs that cannot enforced and will likely result in removing taxicabs as a transportation mode for cruise passengers. These transportation factors justify the Wharves' policy. Complainants cannot prove that they subsidized anyone with their fees. They cannot prove that a single passenger chose a taxicab over their services and that this relief would change this.

### **VIII. CONCLUSION**

Complainants failed to prove their case. They fail to show a violation of the Shipping Act. They make a claim for reparations barred by limitations. They failed to show that they were similarly situated with others not charged the flat fee they demanded. Now they ask the Commission to accept their argument that they should never have been under a flat fee even though they requested it. They ask the Commission to ignore that they benefitted from the flat fee they requested. They ask for reparations based on two theories completely lacking in any evidentiary proof and ask the Commission to allow them to make up data based on alleged "reasonable assumptions" their own testimony discredits. Then they effectively ask the Port to be made to choose from facing a financial disaster by being enjoined from charging any fees unless taxicabs are charged and facing a security and transportation crisis by attempting to charge such a fee and facing the transport of passengers without taxicabs. Complainants present no evidence and make no argument as to why GPFC is in this proceeding at all. The claims against GPFC are frivolous. All of this should be rejected and Complainants claims denied in full.

Respectfully submitted,

**McLeod, Alexander, Powell & Apffel, P.C.**

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ATTORNEYS FOR THE BOARD OF TRUSTEES  
OF THE GALVESTON WHARVES AND THE  
GALVESTON PORT FACILITIES CORPORATION

**CERTIFICATE OF SERVICE**

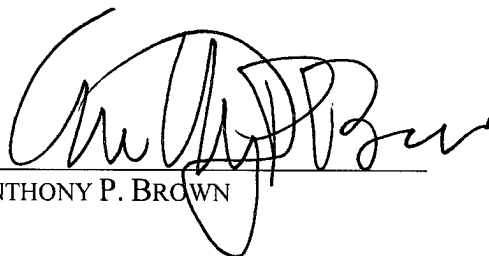
I hereby certify that I electronically filed this document on this **1st day of June, 2015**, and that a true and correct copy of the foregoing was served on all counsel of record *via* certified mail – return receipt requested and email, as indicated below:

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